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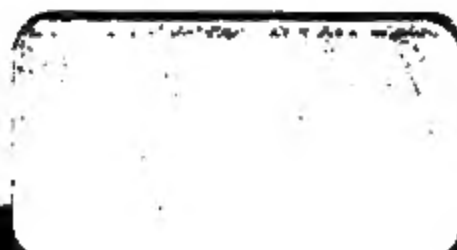
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AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. LIV.

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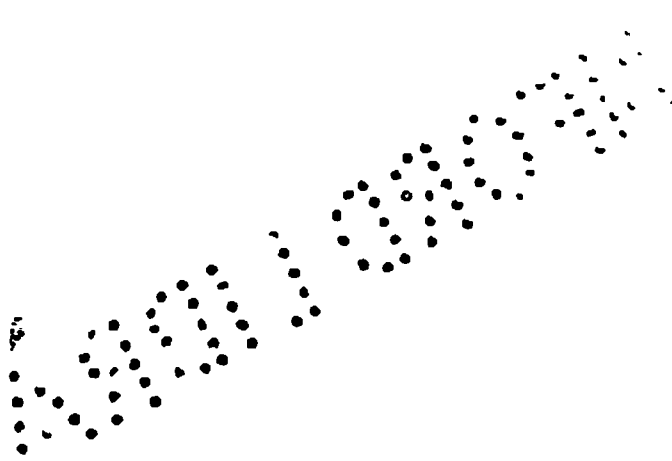
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H. M. SOMERVILLE,
DAVID CLOPTON.

COLORADO.

WILLIAM E. BECK, CHIEF JUSTICE.
WILBUR F. STONE,*
JOSEPH C. HELM,
SAMUEL H. ELBERT.†

DISTRICT OF COLUMBIA.

DAVID K. CARTTER, CHIEF JUSTICE.
ANDREW WYLIE,‡
ARTHUR MACARTHUR,
ALEXANDER B. HAGNER,
WALTER S. COX,
CHARLES P. JAMES,
WILLIAM M. MERRICK.§

GEORGIA.

JAMES JACKSON, CHIEF JUSTICE.
SAMUEL HALL,
M. H. BLANDFORD.

* Term expired January 12, 1886.

† Term commenced January 12, 1886.

‡ Resigned May 1, 1885.

§ Appointed May 4, 1885.

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ILLINOIS.

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PINKNEY H. WALKER,*

T. LYLE DICKEY,

JOHN M. SCOTT,

BENJAMIN R. SHELDON,

JOHN H. MULKEY,

ALFRED M. CRAIG,

DAMON G. TUNNICLIFF.†

INDIANA.

WILLIAM E. NIBLACK, CHIEF JUSTICE.

GEORGE V. HOWE,

BYRON K. ELLIOTT,

ALLEN ZOLLARS,

JOSEPH A. S. MITCHELL.‡

IOWA.

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WILLIAM H. SEEVERS,

JOSEPH R. REED,

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RICHARD HENRY ALVEY, CHIEF JUDGE.

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MASSACHUSETTS.

MARCUS MORTON, CHIEF JUSTICE.

WALBRIDGE A. FIELD,

CHARLES DEVENS,

WILLIAM ALLEN,

CHARLES ALLEN,

WALDO COLBURN,§

OLIVER WENDELL HOLMES, JR.,

WILLIAM S. GARDNER.¶

* Died February 7, 1886.

† Appointed in place of Walker, J., deceased.

‡ Term commenced January 6, 1886.

§ Died September 28, 1886.

¶ Appointed October 18, 1886.

LIST OF JUDGES.

MICHIGAN.

THOMAS M. COOLEY, CHIEF JUSTICE.
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NEW YORK.

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JOHN P. WHITE, CHIEF JUSTICE.

JAMES M. HURT,

SAMUEL A. WILLSON.

WISCONSIN.

ORSAMUS COLE, CHIEF JUSTICE.

WILLIAM P. LYON,

DAVID TAYLOR,

HARLOW S. ORTON,

JOHN B. CASSODAY.

* Died July 25, 1885.

† Appointed August 20, 1835.

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CASES

IN THE

SUPREME COURT

OF

IOWA.

KNAPP V. SIOUX CITY AND PACIFIC RAILWAY COMPANY.

(85 Iowa, 91.)

Negligence — proximate cause.

The plaintiff, a locomotive engineer on defendant's railroad, was injured in reversing his engine, the train having left the track in consequence of a defect in the track. *Held*, that the defect in the track was the proximate cause.

SUFFICIENTLY reported, 80 Am. Rep. 569.

MOLONY V. DIXON

(85 Iowa, 138.)

Party-wall — what constitutes.

The plaintiff bought a lot of the defendant agreeing to erect a building on it, and it was also agreed that when the defendant should build on his own adjacent lot he should construct a stairway to the second story to serve for both buildings and to stand one-half on the land of each party. The plaintiff built his wall twenty inches from the line, and the defendant not only

used it for the stairway but for the independent support of his own building. *Held*, that the wall became a party-wall and defendant was liable for one-half the cost.

ACTION for one-half the cost of a party-wall. The opinion states the case. The plaintiff had judgment below.

McNett & Tisdale, E. H. Stiles and J. W. Dixon, for appellant.

J. J. Smith and W. H. C. Jaques, for appellee.

SKEEVERS, J. In 1880 the plaintiff purchased of the defendant and J. G. Hutchinson a lot in the city of Ottumwa, upon which the plaintiff agreed to erect a two-story brick building; and it was further agreed between said parties that when the defendant constructed a building on the adjoining lot he would construct in connection with the plaintiff's building a stairway to the second story, of the usual width and to be constructed in the usual manner, one-half of which should be on the ground of each party. The plaintiff erected her building and placed a portion of her wall on her own ground twenty inches from the line. The defendant afterward constructed a building on the abutting lot. He also constructed a stairway as he had agreed to do, and this action was brought by the plaintiff to recover for the cost of one-half of the wall which was twenty inches from the line and entirely on her own land, on the theory that it was in fact a party wall. The court instructed the jury "under the contract of the parties the defendant had the right to construct the stairway in question. In so doing he might build into that part of the plaintiff's wall that stands on her own land for the support of the common stairway without making that part of the plaintiff's wall a party wall. If the defendant built into that part of the plaintiff's wall that stands entirely on her own land, only so far as it was necessary to support the common stairway, although it may incidentally afford some support to defendant's building, yet in that event defendant would not be liable to pay for one-half of said wall; but if the defendant built into that part of plaintiff's wall that stands entirely on her own land in such a way as to support his building and in a way not demanded for the support of the stairway, then you should allow the plaintiff one-half of the value of that part of the wall at the time the defendant used it with six per cent interest

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thereon." The defendant contends that this instruction is erroneous and that a wall cannot be regarded as a party wall which is entirely on the property of one of the adjoining proprietors. In Washburn on Easements, *467, it is said that "the cases, both in the English and the American courts, have been so few, in which the rights of parties in respect to party walls have been considered: that I have been induced by the importance of the subject to depart from the general rule in reference to this work and borrow somewhat freely from the French law, as throwing light upon some points not yet adjudicated by the common-law courts. But it should be remembered that by both the civil and the common law, if the subject becomes one answering to the character of a party wall, it must be made so by the agreement, actual or presumed, of the parties to that effect." Our statute on this subject, it has been said, was copied from the civil law of Louisiana. Note to *Bertram v. Curtis*, 31 Iowa, 46. Therefore it is not surprising that counsel have been unable to cite any case in which the question under consideration has been adjudicated. The statute provides that where a person is about to erect a building contiguous to the land of another, he may rest one-half of his wall on the land of his neighbor, and the latter has the right to make the wall a party wall by paying one-half of the expense of constructing the wall. Code, §§ 2019, 2020. But a person is not compelled to so construct his building. He may build it immediately on the line but entirely on his own ground, and without doubt we think the owner of the abutting property would have the right to make such wall a party wall by connecting his building with the one constructed by his neighbor by paying one-half of the expense of the wall, and one-half of the value of the land on which it is situate. The statute so provides. Code, § 2027.

The present case is materially different, the wall being not only entirely on the plaintiff's ground but twenty inches from the line of the defendant's property. Can such a wall become a party wall? We think it may be so regarded under the facts of this case, as contemplated in the instruction under consideration. The thought of the Circuit Court seems to have been that as the plaintiff erected her building so that the defendant could construct a stairway, if he, in so doing, used the wall, not for stairway purposes, but as a party wall, then he should pay one-half of the expense of its construction. But for the stairway, the plaintiff would not have built

her wall as she did. The stairway was for the accommodation of both parties. The plaintiff's wall answers the purpose, and is used by the defendant as a party wall. The jury, at least under the evidence, was authorized to so find. We think if the wall was used as a party wall, and so regarded by the parties, then they should mutually contribute to the expense of its construction. An agreement should be implied from the acts and conduct of the parties. This seems to have been the thought of the court in *Zugenbuhler v. Gilliam*, 3 Iowa, 391. It is there said, in speaking of the conduct of the defendants in relation to a party wall: "They built into it, they use it, and in so doing they make it a party wall, and become liable to contribute to its cost." Counsel say that if a wall twenty inches from the line may become a party wall, so may a wall which is five or ten feet distant. No such case can be anticipated, but if the wall was so built for the purpose of constructing a stairway, as in this case, we are not prepared to say that such result would not logically follow. Stress must be laid on the fact that it was mutually agreed that the plaintiff would erect the wall as she did, and that it has been used as a party wall. Counsel further say that when the defendant used the wall for any purpose other than for the stairway, he committed a trespass. This may be conceded, but the plaintiff may waive the trespass and sue on the implied agreement. It is further said that as the defendant constructed a wall on his side of the stairway, it is not just to make him contribute one-half of the expense of the wall on plaintiff's side; but there is no pretense that the defendant's wall supports the plaintiff's building, nor that it in any sense is a party wall. We think the instruction is correct, and that the verdict is warranted by the evidence.

[Omitting minor points.]

Judgment affirmed.

Koontz v. Chicago, Rock Island and Pacific Railroad Company.

KOONTZ V. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

(85 Iowa, 224.)

Master and servant — duty of railroad as to bridge under repair.

A railroad company is not liable for the death of a brakeman caused by his falling through a bridge in process of repair, upon which the train had stopped at night.

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

C. S. Ranck, S. M. Finch and S. H. Fairall, for appellant.

Boal & Jackson, T. S. Wright, for appellee.

SEEVERS, J. A short distance west of Iowa City the defendant constructed a bridge, which formed a portion of its track. At the time of the accident the defendant was engaged in repairing the bridge, or rather was at that time replacing the old with a new bridge. The old bridge, or portions of it, had been taken away, but trains continued to pass over it as previously, except that they were run at a less rate of speed. The accident occurred about 9 o'clock at night. The train was stopped on the bridge because the engineer supposed some of the cars were off the track or one of the brakes was set. The deceased was riding in the cab with the engineer or fireman, and when the train stopped the fireman picked up a lantern and got down for the purpose of seeing what was the matter, and the deceased also did the same thing but he did not have any lantern. When the deceased was next seen he was lying at the base of an abutment of the bridge greatly injured, and because of such injuries he in a few days thereafter died. The deceased must have passed on the grade alongside the cars for a short distance and stepped off the abutment through an opening in the bridge. There is no evidence tending to show that trains usually stopped on the bridge or where this one did, for any purpose which required an employee to get down from the train on the track or bridge. The plaintiff claims to be entitled to recover because the bridge was "in an unsafe and dangerous condition for

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the employees of the defendant, whose duty it was to go upon the same." There was evidence tending to show that when there is any thing the matter with the train which causes it to be stopped, it is the duty of the brakeman to ascertain what the matter is, and in the performance of his duty he may get down on the track and walk alongside of the cars.

One material question discussed by counsel is whether the defendant was negligent in permitting the bridge to be in the condition it was. In determining this question it will be assumed that but for the repairs being made the accident would not have occurred — that is, that the old bridge was so constructed with planks laid over the same that the deceased would not have fallen ; but there was no evidence tending to show that he had knowledge that such was the case or could possibly have so supposed. Bridges and railway tracks must be repaired and in doing so ordinary care must be exercised. What probably will occur should be anticipated and guarded against. The bridge in question was sufficient for trains to pass over it with safety. For this purpose due care did not require that the bridge should be planked. If however it was necessary for employees to pass over the bridge in the performance of their duties, ordinary care would seem to require that barriers should be erected or other precautions against accident used ; the rule being as we understand, when employees are required to use appliances in the performance of their duties, that such appliances should be kept in suitable repair and be reasonably sufficient for the purpose intended. Several authorities are cited in support of this proposition, and we do not understand the rule to be controverted by counsel for the defendant. Their contention is that it could not be anticipated that something would occur which would render it necessary to stop the train at the place it did, and that it would be necessary for an employee to pass along the track and over the bridge, for the purpose of ascertaining what was the matter ; and we think this is so. If this is not true, then every bridge must be planked or otherwise guarded, and barriers must be erected at every cattle-guard ; for it is impossible to tell where it may become necessary or prudent for a train to be stopped, and an employee required in the performance of his duty to pass alongside of the train for some necessary purpose. There is no evidence tending to show that this bridge is an exception to those constructed at other places on the line of the road. Ordinarily it is not expected that employees

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will be required to walk across bridges and they are not ordinarily constructed so that this can be done with entire safety ; at least during the night-time.

Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur. That a railroad company should anticipate that a train may for some necessary purpose be stopped at a place other than the usual stopping places is possibly true ; but at what place cannot be anticipated, and therefore they in the exercise of ordinary diligence are not required, as we have said, to plank every bridge or cattle-guard, and have the whole track so guarded as to prevent accident to employees. The hazardous nature of the business is such that accidents occur for which the company is not responsible; and this is one of them. In support of the foregoing views, analogous cases might be cited. The facts however in such cases not being like those in the present case, we are content to base our conclusion on principle.

It is said that the court erred in not submitting the question of negligence to the jury, but as there is no dispute as to the facts above stated, we think it was for the court to determine such question as a matter of law.

Judgment affirmed.

ANTROBUS V. SHERMAN.

(65 Iowa, 280.)

Attorney and client — authority to delegate employment.

A client is not liable for costs made by an attorney employed by his attorney.

THE opinion states the case. The defendant had judgment below.

A. M. Antrobus, appellant in person.

P. P. Kelley, for appellee.

BECK, J. The record discloses the following facts: Plaintiff sent the note upon which judgment in this case was rendered to Gregg, an attorney at law, for collection, who prepared a petition and other papers required in the commencement of a suit, and sent them to Hale, Stone & Proudfit, attorneys residing in the same

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county with defendant, with directions to file the papers and take other necessary steps in order to institute the suit. At the request of Gregg, these attorneys gave attention to the case, and finally procured judgment. After judgment, Gregg directed them to press the collection. They instituted garnishment proceedings, and costs thereon for sheriff's fees to the amount of \$116 were made. The purpose of the proceeding is to recover these costs from plaintiff. It is shown that plaintiff neither directed nor consented to the act of Gregg in transferring the case to Hale, Stone & Proudfit, and had no knowledge thereof, nor of the proceedings instituted by them, wherein the costs in controversy were made, and it is not claimed that he ratified their acts in any manner.

Plaintiff now insists that he is not responsible for the acts of Hale, Stone & Proudfit in the case, and is not liable for the costs made under their directions; that Gregg had no authority to employ them for him; and that the acts done in the exercise of their discretion do not bind him. A familiar and general rule of law applicable to the relation of principal and agent is, that the agent cannot delegate the authority conferred upon him to another, so that the principal will be bound by the acts done in the discretion of one to whom the agent attempts to delegate his authority. The rule is based upon the consideration that to the agent is confided a personal trust and confidence which controlled his appointment or selection, and is essential to the existence of the relation of principal and agent. We know of no rule excepting from the operation of this doctrine any attorney at law, whose duties, responsibilities and liabilities arise from the relation of agency existing between him and his client, though they are varied from those of other agents by consideration of the peculiar service he is required to perform. Indeed it would appear, in view of the fact that attorneys are chosen by reason of their peculiar capacities and character, and other personal qualities, that the principles we have stated should be rigidly applied in cases of this kind. *Smalley v. Greene*, 52 Iowa, 241; s. c., 35 Am. Rep. 267. We conclude that plaintiff is not bound by the acts of Hale, Stone & Proudfit in making the costs for which he is charged by the judgment of the court below. In support of this conclusion see *Hoover v. Greenbaum*, 61 N. Y. 305;* *Danly v. Crawl*, 28 Ark. 95.

[Another point omitted.]

Judgment reversed.

*Affirmed, 91 U. S. 308.

Jacobs v. Tobiason.

JACOBS V. TOBIASON.

(85 Iowa, 245.)

Contract — to abandon proceeding to open highway — public policy.

An agreement to abandon a proceeding which one has commenced to establish a highway, in consideration of money to be paid, is void.

ACTION for money. The head-note states the point. The defendant had judgment below.

E. Keeler and Sheeun & McCarn, for appellant.

J. W. Dorsee, for appellee.

REED, J. Plaintiff was examined as a witness in his own behalf, and his testimony was the only evidence introduced on the trial. He testified in substance that after the appeals were taken, and while the causes were pending in the Circuit Court, an agreement was entered into between him and defendant for the settlement of the causes and their final disposition; that his undertaking in the agreement was that he would make no further appearance in the causes, and would cease all efforts for procuring the final establishment of the highways, and that he would withdraw the money which he had deposited with the county auditor for the payment of the awards; and that defendant agreed, in consideration of his doing these things, to pay him \$100, and to take care of the costs in the cases; and that he had paid out as attorney's fees, and other expenses incurred by him in the proceeding to establish the highway, about the sum of \$100; and that the object of the parties in entering into the agreement was to put an end to the proceedings, and to reimburse him for the expenses he had incurred therein. On this testimony the Circuit Court ruled that the contract was against public policy, and was therefore not enforceable; and the jury were directed to return a verdict for defendant; and the only question presented by the record is as to the correctness of this ruling. We think the ruling is correct. Proceedings for the establishment of public highways are essentially public in their character. They are in the exercise by the State of one of its sovereign powers. The rights which are established and

the privileges which are created by the proceedings are for the benefit of the whole people.

The proceeding can be instituted, it is true, only on the petition of some member of the public who is interested in the question, and it may be carried on in his name, and he may be made responsible for the costs occasioned by it, and if damages are awarded to those whose lands are appropriated for the use of the highway, he may be required to pay the same as a condition to its establishment, and if an appeal be taken from such award, he may be made a party to the litigation thus instituted, and may ultimately be compelled to pay the costs occasioned by it. Code, title VII, chap. 1. But the proceeding is not for his benefit. It is a proceeding by the State for the benefit and advantage of all the people of the State, and the petitioner acquires no special rights or advantages by it. In so far as his efforts are instrumental in procuring the establishment of the highway, he acts for the public. In instituting and carrying on the proceeding, he acts, in a sense, in a public capacity. He invokes the power of the State, and it is exercised for the benefit of the common public, and he, in a sense, represents that public, and stands for it in the proceeding. It is true, he cannot be compelled to institute the proceeding, and it may be true also, that having voluntarily begun it, he cannot be compelled to continue it to a final result. If it turns out that the burdens likely to be imposed upon him are greater than was anticipated when he instituted the proceedings, it may be that he has the right to retire from them, or discontinue them entirely. But when he has assumed a position of trust toward the public, and instituted a proceeding of public concern, he cannot be permitted to make the question whether he will remain in the position or continue the proceeding a matter of private bargain for his own emolument. One occupying a public office has the undoubted right to resign his position. But if a public officer were to agree with one who, for any reason, was desirous that a vacancy in the office should be created, that for a money consideration he would resign the office, it would hardly be contended that such contract was enforceable. Yet it seems to us there is no difference in principle between that case and the one before us. The highest considerations of public policy demand that all duties in which the State and public are concerned shall be performed with fidelity; and no man who has once assumed the performance of such duties

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should be permitted to make the question whether he will continue in their performance a matter of private speculation.

We think the judgment of the Circuit Court is right, and it is affirmed.

Judgment affirmed.

MALONE V. BURLINGTON CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

(65 Iowa, 417.)

Statute — "use and operation of a railway."

Wiping locomotive engines, opening and closing doors of an engine-house, and removing snow from a turn-table and the tracks, do not pertain to the "operation of a railroad," although turning the turn-table does.

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

Blake & Hormel, for appellant.

Samuel K. Tracy, for appellee.

REED, J. It was proven on the trial, that at the time he received the injury complained of plaintiff was, and for some years had been, in defendant's employ as a wiper; that his duties were to clean the engines when they were brought in off the road, to open the doors of the engine-house to admit the passage of engines into and out of the house, and close the same after the engines had passed; to turn the turn-table; to shovel the snow from the turn-table and tracks leading to the engine-house into a dumpy or hand car, and move the same to some convenient and accessible place on the main track over which the trains passed, and there shovel the snow from the dumpy; that on the night of the accident plaintiff and a foreman and another wiper went to the doors of the engine-house for the purpose of opening them to admit the passage of an engine which had just come in.

There are two doors at the entrance of the engine-house, which when being opened, swing outward from the center of the entrance. The parties had difficulty in opening them on the occasion in question, owing to an accumulation of ice on the ground immediately

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outside of the door ; and they took picks and removed a portion of the ice, when they were enabled to open them without accident, and the engine passed in. They then attempted to close the doors. Plaintiff took hold of one door and closed it without difficulty; but the other parties had difficulty in closing the other, and the other wiper placed a crowbar under it for the purpose of raising it to enable it to pass over the ice. In doing this he lifted it off the hinges, and it fell upon plaintiff inflicting the injuries complained of. At the time the door fell upon him, plaintiff was standing on the track leading to the engine-house, it being his duty to remain there and assist in closing the door ; and he was not guilty of any negligence which in any manner contributed to the injury. As there was no conflict in the evidence as to the character of the duties which devolved upon plaintiff by virtue of his employment, or as to the circumstances under which the injuries were received, the court ruled as matter of law that he could not recover, and directed the jury to find for defendant.

The case has once before been in this court. 61 Iowa, 326; s. c., 47 Am. Rep. 813. On the former trial the District Court instructed the jury, that if plaintiff's duty was to open and close the doors to the engine-house, and while he was in the performance of that duty he was injured by one of the doors falling upon him, and this was occasioned by the negligent act of a co-employee in lifting said door from its hinges, he was entitled to recover. But it was held by this court that this instruction was erroneous, and the judgment was reversed. In addition to the facts established on the first trial, it was proved on the second trial that plaintiff was required, when opening or closing the doors of the engine-house, to stand on the track leading into the building. Also that it was his duty to turn the turn-table, and remove the snow from the turn-table and tracks leading into the engine-house. It is now contended by counsel for plaintiff: First, that our holding on the former appeal is not necessarily conclusive of plaintiff's right to recover on the facts as proved on that trial; or if this is not so, second, that the facts proved on the second trial distinguished the case from that made on the former trial, and bring it within the provision of section 1307 of the Code. The instruction given on the former trial held, that if plaintiff was injured while in the performance of his duty of opening or closing the doors, and the injury was caused by the negligence of a co-employee in lifting the door from its hinges, he was

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entitled to recover. This was held erroneous on the grounds (1) that the particular duty in which he and his co-employee, whose negligence caused the injury, were engaged at the time of the accident did not pertain to the business of operating the railroad; and (2) neither that particular duty, nor any other which the nature of his employment required him to perform, as shown by the evidence, brought him within the class of employees who are engaged in the business of operating the railroad. The construction which has been put by the adjudications of this court upon the statute under which the liability of railroad companies to employees for injuries caused by the negligence of co-employees arises, is that it affords a remedy only to such employees as are employed at the time of receiving the injury in the business of operating the railroad. *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52; *Schræder v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 344; *Smith v. Burlington, C. R. & N. R. Co.*, 59 Iowa, 73; *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa, 664. And the holding that the facts proved showed that plaintiff was not so engaged at the time of the injury necessarily concludes all right of recovery upon those facts.

We come then to the question, whether the facts proved on this trial bring the case within the statute, and we think it is clear that neither the wiping of the engines, nor the opening and closing of the doors of the engine-house, nor the removing of the snow from the turn-table and tracks, in any proper sense pertain to the operation of the road. The only duty which plaintiff was required by his employment to perform, which it can be claimed at all pertains to the operation of the railroad, was that of turning the turn-table. As we understand it, this table is a circular platform, so constructed and supported that it may be turned upon its center. There is a track leading to it from the main track of the road, and from it other tracks radiate as from a center, leading into the different stalls in the engine-house, and there are rails upon it. When an engine is to be run from the main track into the house, the table is so adjusted as to connect the rails on the table with the track leading from the main track. The engine is then run upon the table, which is then turned until connection is made between the rails on it and one of the tracks leading into the engine-house, when the engine is run into the building; and engines are taken from the engine-house to the main track in the same manner.

Plaintiff's duty was to turn the table and make these adjust-

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ments at times when engines were being run between the main track and engine-house. His duty in that regard was somewhat similar to that performed by a switchman in adjusting the switches to permit the passage of trains from the main line to the side tracks, and we think it may be said that in performing this duty he was engaged in the operation of the road, just as the switchman is engaged in its operation when he adjusts the switch. Each in the performance of the duty assigned him does an act which is necessary to be done in the use and operation of the road, and if either should be injured while in the performance of the duty, in consequence of the neglect or mismanagement or willful wrong of a co-employee, who at the time was also engaged in the operation of the road, he would probably have a remedy therefor, under the statute against the company. But plaintiff did not receive the injury of which he complains while in the performance of that duty, but it was inflicted while he was in the performance of another duty, which as we think was in no manner connected with the operation of the road. It is insisted however that his employment was entire, and as part of his service related to the business of operating the road, he has his remedy under the statute, even though the injury was not sustained while in the performance of that particular part of the service. The case of *Deppe v. Chicago, R. I. & P. R. Co.*, *supra*, is relied on as sustaining this view, and it must be admitted that some things are said in the opinion in that case which seem to favor this claim.

But we think the question is materially affected by an amendment of the statute which has been enacted since that decision. That case was decided under section 7, chap. 169, acts 1862, which is as follows: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage." The present statute is section 1307 of the Code, which is as follows: "Every corporation operating a railroad shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner con-

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nected with the use and operation of any railway on or about which they shall be employed." And this statute was in force at the time plaintiff received the injuries in question. In construing this section in *Foley v. Chicago, R. I. & P. R. Co., supra*, we held that the term "such wrongs," in the latter clause of the section, did not relate alone to the willful wrongs spoken of in the preceding clause, but that it related as well to the mismanagement and negligence spoken of in the former part of the section. Under this construction it is apparent that the last clause of the section creates a limitation as to the class of acts for which the company is liable, which did not exist under the former statute. The liability created by the act of 1862 is expressed in general terms. By it the company is made liable for all damages sustained by any person in consequence of any mismanagement or neglect of its employees. The acts or omissions of its employees for which it would be liable would be such, of course, as the employees should commit in the course of their employment; but its liability is not otherwise limited by the act; while under the present statute, its liability is limited to such damages as are occasioned by the negligence or mismanagement or willful wrongs of its employees, which are connected with the use and operation of the railroad on or about which they are employed.

To meet the objection that the act of 1862 created a rule of liability which was applicable to railroad companies alone, and did not affect other employees under precisely the same circumstances, and that it was therefore class legislation, and in violation of the State Constitution, the court in *Deppe's* case construed the act as creating a remedy only in favor of that class of employees who were engaged in the hazardous business of operating railroads, and the correctness of the holding of that case on that question is not doubted. But the subsequent legislation has established a new rule as to the class of acts for which the companies are liable. So that to entitle an employee now to recover against the company for injuries which he has sustained in consequence of the negligence or mismanagement or willfulness of a co-employee, he must show (1) that he belonged to the class of employees to whom the statute affords a remedy, and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given. We think it very clear that the plaintiff has failed to establish the latter fact.

The District Court therefore rightly directed the jury to find for defendant.

Judgment affirmed.

Gray v. McReynolds.

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(85 Iowa, 461.)

Contract — to break a will — public policy.

An agreement between the father and grandfather of an infant legatee, on one side, and an heir at law, not a legatee, on the other, that the latter should resist and the former should not insist on probate, and if the will should be set aside the heir should pay the infant the amount of his legacy, the object being to defeat a residuary legatee, is void.*

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

Stiles & Beaman and W. W. Cory, for appellant.

H. B. Hendershott and McNett & Tisdale, for appellee.

ROTHROCK, C. J. The facts in the case, about which there is no dispute, are as follows: J. W. C. Reynolds, of Jefferson county, in this State, died May, 1870, leaving his wife, but no children, surviving him. He made a will by which he constituted Isaac D. Mowry his executor. He bequeathed to his wife \$5,000; to his mother-in-law, Sallie Mowry, \$350; to Madison McReynolds, Susan McReynolds and Martha McReynolds \$2,000 each; to John S. Gray, the infant son of his deceased sister, the sum of \$1,000; to Willie McReynolds \$300; to his stepmother \$50; and the balance of his estate he bequeathed to the masonic lodge at Abingdon, as a permanent fund to educate the orphan children of master masons. There were one or two other bequests made in the will, not necessary to be mentioned here. This will was made but a short time before the death of the testator. By the will the principal part of the estate was intended to be bequeathed to his wife, and to his brother and sisters, and to the minor children of his deceased brother and sister, with a small amount to his wife's mother, and the residue was given to the masonic lodge at Abingdon. Solomon McReynolds, the father of J. W. C. McReynolds, survived him, and in the absence of a will one-half of the estate would have gone to the wife, and the other half to Solomon McReynolds, the father.

* Compare *Mercier v. Mercier* (50 Ga. 546), 15 Am. Rep. 694; *Taylor v. Mitchell* (87 Penn. St. 518), 30 Am. Rep. 883.

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In a short time after the death of the testator the will was filed for probate. The legatee, John S. Gray, was then some three or four years of age. His mother died within a month after he was born, and his grandfather, J. G. Gray, took charge and control of him, kept him and with some assistance from the father of the boy, clothed, sustained and cared for him as his own child. After the will was filed for probate, Solomon McReynolds made an agreement with the grandfather and father of the infant child that he (McReynolds) would resist the probate of the will, and that they, as the representatives of the child, should not insist on the probate, and that if it was not probated, he (McReynolds) would pay to the child the amount of the legacy named in the will.

The contract, as stated by John G. Gray in his testimony, was as follows: Solomon McReynolds "came to my home, and his wife and Martha and J. W. McReynolds came there on, I think, about a week before the court at Fairfield, and asked me if I had got a letter from him. I told him I had. Said he, 'I want to break Joseph's will.' Says he, 'I want you to lay still and let me do it. I want the heirs to have every cent the uncle willed them, but I want to break that will;' that Mowry wanted to destroy the property or the money, and I want to break that will and get the money out of the Masons' hands; that was the contract between him and me, that Johnny and the other minor heirs should have the money that the uncle willed them.

Solomon McReynolds appeared and resisted the probate of the will, and the same was set aside, and the application to have the same admitted to probate refused. No one appeared in the proceedings in behalf of the minor, John S. Gray. Solomon McReynolds afterward died without paying plaintiff the amount of the legacy, and this action is brought against his estate to recover upon the oral contract above set out.

The defendant demurred to the petition, objected to the evidence of the contract, and moved the court to direct the jury to return a verdict for the defendants upon the grounds, among other things, that the contract as pleaded and proved was without consideration against public policy and void. They also asked instructions to the jury to the same effect. All of these objections were overruled.

We think that upon these undisputed facts the plaintiff is not entitled to recover, for two good and sufficient reasons:

- (1) The contract was without consideration. It may be conceded

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for the purposes of the case, that the father and grandfather of the plaintiff had authority, by reason of their relation to the plaintiff, to make a contract which the plaintiff could enforce against Solomon McReynolds. But that is not the question here presented. There must be a consideration moving from some person. The promise in behalf of the minor to "lay still" and allow McReynolds to set aside the will was binding on no one. There was nothing to prevent the minor, and all his friends, guardians and protectors, from doing all they could to uphold the will. If they had done so Solomon McReynolds could not have claimed in the Probate Court that they had contracted not to do so.

(2) But suppose we were to concede that the failure to appear in support of the will was a consideration in support of the agreement. It appears to us that the object of the contract was against public policy, as tending to thwart justice. The avowed purpose was to prevent the Masonic lodge from receiving its legacy. It must be remembered that the plaintiff is seeking a recovery upon the contract made for his benefit. He must accept the contract as it was made. He cannot be allowed to divest it of any of its provisions because of his infancy. The evidence shows that the officers of the Masonic lodge were not advised of the contract. They knew nothing about it. Suppose that all of the beneficiaries under a will excepting one should unite in a contract with an heir that they would do nothing to uphold the will, and that the heir, if successful in defeating it, should pay their legacies, and this contract was made to defeat the legacy of the one not entering into the contract. It is very plain that such a contract is void as against public policy and no recovery can be had thereon by any of the parties to it. The case of *Fulton v. Smith*, 27 Ga. 413, and the other cases cited by counsel for appellee, are unlike the case at bar in their facts. They are cases of contracts between heirs and legatees where there was no "laying still" by any one of them. They were fair, open contracts, made to avoid family difficulties, for the purpose of an equitable and just distribution of property.

We think the court should have directed the jury to return a verdict for the defendants, because upon the undisputed facts the plaintiff was not entitled to recover.

Judgment reversed.

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LITTLETON V. FRITZ.

(65 Iowa, 488.)

Constitutional law — statute authorizing citizen to have nuisance prohibited.

A statute, authorizing any citizen of a county where a place for the unlawful sale of intoxicating liquor is kept, to maintain an action to prohibit and abate it as a nuisance, is constitutional.

ACTION to abate a nuisance. The opinion states the case. The injunction was granted below.

Lehman & Park, W. S. Sickmon and Bills & Block, for appellant.

Baylies & Baylies, Smith McPherson, attorney-general, Jed. Lake, James O. Crosby, S. P. Adams, Rickel & Bull and Remley & Remley, for appellee.

ROTHROCK, J. I. The plaintiff does not aver in his petition that he has sustained, or will sustain, any damage or injury by the maintenance of the alleged nuisance, for which he can be compensated in a money judgment. He claims the right to maintain the action because he is a citizen of Polk county, and because the keeping and maintaining the nuisance in the county is a great damage and injury to the property, peace and safety of the plaintiff and other citizens of said county.

The case therefore turns upon the question whether any citizen of the county, where a nuisance of this character is kept, may maintain an action in equity to enjoin and abate it, and whether the court has the power under the law to order a temporary injunction in such cases. It is not disputed that the building or erection of whatever kind, in or at which intoxicating liquors are unlawfully manufactured or sold, is a nuisance. It was provided in section 926 of the Code of 1851, that "the places commonly known as 'dramshops' are hereby prohibited, and declared public nuisances. * * *" The law with reference to the sale of intoxicating liquors has undergone many changes since 1851; but the unlawful traffic has always since that time been declared by legislative enactment to be a nuisance. The provision above cited has never been repealed. That the legislature has ample power to prohibit the

manufacture and sale of intoxicating liquors has been settled law in this State for more than thirty years. Legislation upon that subject has been uniformly upheld and approved by this court since the decision in the case of *Our House v. State*, 4 G. Greene, 172, and the case of *Santo v. State*, 2 Iowa, 165; s. c., 63 Am. Dec. 487. Thousands of persons have been prosecuted by indictment, fined and imprisoned in this State for the maintenance of nuisances in the keeping of saloons.

By chapter 143 of the Laws of the Twentieth General Assembly, the statute upon this subject was amended. It was made more sweeping in its provisions, by prohibiting the sale of all kinds of intoxicating liquors, under heavy penalties, excepting sales for certain purposes by permit from the board of supervisors of the county. After providing for punishment for specific sales, the act in its twelfth section provides that for violation of the law by unlawful sales, "the building or erection, of whatever kind, or the ground itself, in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued or exists, and the furniture, fixtures, vessels and contents is hereby declared a nuisance, and shall be abated as hereinafter provided; and whoever shall erect or establish or continue or use any building or erection for any of the purposes prohibited in said section (the section of the law prohibiting sales) shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding \$1,000, and costs of prosecution. * * * Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than \$500 nor more than \$1,000, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court."

This statute plainly authorizes any citizen of the county to maintain the action, and there can be no denial of the right of action, unless it be held that the legislature had no constitutional power to enact the law. Counsel for appellant contend that the statute is repugnant to sections 9, 10, 11 and 12 of article I of the Constitution. These sections provide that "the right of trial by jury shall

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remain inviolate," and that in all criminal prosecutions, involving life or liberty, the accused shall have the right to a trial by jury, upon an indictment by a grand jury.

The question presented by counsel in argument may be stated in this general form: Is the statute under consideration an attempt upon the part of the law-making power to deprive the citizen of the constitutional right to be tried by a jury? It is important at the outset to inquire: In what cases was the right of trial by jury inviolate when the Constitution was adopted, for it will be observed that the provision is that the right "shall remain inviolate." This provision, or its equivalent, is common to the Constitutions of many States of the Union, and it has been held that it secures the right of trial by jury in all cases in the trial of which a jury was necessary according to the principles of the common law. *Isom v. Mississippi Cent. Ry. Co.*, 36 Miss. 300. In *Plimpton v. Town of Somerset*, 33 Vt. 283, it is said that "the general rule of construction in reference to this provision of the Constitution is, that any act which destroys or materially impairs the right of trial by jury, according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional."

The jurisdiction of courts of equity to enjoin and abate nuisances is of very ancient origin. In 2 Story Eq. Juris. 921, this language is employed: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date, and has been directly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances strictly so called, but also to *purprestures* upon public rights and property." This general rule is not, and cannot be disputed. Courts of equity in nearly all the States of the Union entertain jurisdiction to restrain and abate nuisances, either at the suit of a public prosecutor, or at the instance of a private individual, who shows that he sustains some special injury by the establishment or existence of the nuisance.

Such a case being of equitable cognizance, neither party could, at the time of the adoption of the Constitution, demand a jury trial as matter of right. There was no statute law or constitutional provision then in force which gave an absolute right to a trial by jury in an equity case. *State v. Orwig*, 25 Iowa, 280, *Clough v. Seay*, 49 Iowa, 111. All actions in equity were required to be tried by a chancellor. It is true, the chancellor was authorized, by the

manner of procedure in courts of equity, to make up issues of fact, called issues out of chancery, and refer them to a jury to enlighten his conscience; but the parties had no right to demand a trial of any issue in an equity case by a jury.

But it is insisted by counsel for appellant that courts of equity did not have jurisdiction at the time of the adoption of the Constitution to abate any nuisance, except in cases where some property right was affected by the maintenance of the nuisance, and it is contended that the enlargement of the jurisdiction to that class of cases in which property rights are not involved is an abridgment of the right of trial by jury. The jurisdiction of the cause of action "is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists." 1 Bouv. Law Dict. 769.

Let it be conceded that courts of equity, before the adoption of the Constitution, declined to entertain actions of injunction to restrain and abate nuisances in cases where no property rights were involved. The legislative history of this State, and the jurisdiction entertained by its courts, do not warrant the conclusions that there is no legislative discretion in regard to what controversies shall be of equitable cognizance. Since the adoption of the Constitution, a jury has been allowed in actions for divorce, and this right has been taken away. So in case of the foreclosure of mortgages and mechanics' liens. We are not then required to examine the laws in force at the time the Constitution was adopted, and hold that in every case which was then triable by a jury the right to such trial remains inviolate. Such a construction of the constitutional provision involves too narrow a view of legislative power. It being conceded that equity had jurisdiction in cases of nuisance, we can see no invasion of the rights of the citizen by an act of the legislature extending it to cases where no distinct property right is involved; and we may say here that the distinction sought to be made between nuisances where property rights are involved and where they are not is very limited narrow and ill defined.

Courts constantly enjoin nuisances where no damages can be estimated in money and where the nuisance produces mere annoyance and discomfort to the complaining party; as a manufacture producing discomfort to individuals (*Callin v. Valentine*, 9 Paige, 515); a blacksmith shop near plaintiff's dwelling (*Faucher v. Grass*, 60 Iowa, 505); a livery stable (*Shiras v. Olnger*, 50 Iowa, 571; s. c., 33 Am. Rep. 138); a hog lot (*Richards v. Holt*, 61

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Iowa, 529). These and many other cases which might be cited show a very great relaxation of the old rule that no action will lie to restrain and abate a public or common nuisance, unless the plaintiff, in the language of Blackstone, "suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have private satisfaction by action; as if by means of a ditch dug across a public highway, which is a common nuisance, a man or his horse suffer any injury by falling therein, for this particular damage, which is not common to others, the party shall have his action."

It is not easy to perceive why the law-making power may not authorize the suppression of the saloon nuisance by injunction because no property rights are involved. It was always allowable to enjoin the obstruction of a public highway, or a navigable stream, by an action in equity at the suit of the public. This was done because it was claimed that a property right in the public was involved; and such proceedings were authorized without the aid of any statute. Such nuisances are detrimental to the public because they obstruct travel and impede navigation. But the damages to the public are no more susceptible of computation than the injuries to the public by the unlawful maintenance of a saloon. In *State v. Iron Cliffs Co.*, 54 Mich. 350, in discussing the power of the legislature under this provision of the Constitution, it is said that "its power to create and enlarge equitable jurisdiction is not only undoubted but unlimited." Without further dwelling upon this branch of the case, we conclude that the statute in question, so far as it authorizes the action, is not repugnant to the Constitution.

II. It is further insisted that the action in equity authorized by the statute cannot be maintained, because the legislature has no power to enforce a criminal law by a civil action. But "one maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance, may be prosecuted against him. *Richards v. Holt*, 61 Iowa, 529; *Ewell v. Greenwood*, 26 Iowa, 377. These cases were decided without any reference to a statute expressly authorizing an action in equity in addition to criminal punishment. It ought not to be claimed that a statute is unconstitutional which merely provides a remedy which was available without the statute. And it must be remembered that the

defendant is not convicted and punished for a crime by the injunction. It belongs to that class of remedies which may properly be provided by statute to aid in the administration of preventive justice. It stays the arm of the wrong-doer. It does not seek to punish him for any past violations of the law. Its purpose is to prevent a public offense and suppress what the law declares to be a nuisance. The denial of a trial by jury is not so oppressive to the party charged as the statute requiring a person who threatens to commit a public offense to give bonds with sureties to keep the peace toward the people of the State, and in default of giving the bond committing him to prison. Code, §§ 4115-4119. So far as we are advised no one has ever claimed that the law requiring security to keep the peace was a denial of the right of trial by jury.

The defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands in effect that the courts must establish the principle that because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity. Such a rule would not command the respect or approval of any one.

There are many adjudged cases, aside from those above cited, which expressly hold that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction. *People v. City of St. Louis*, 5 Gill. (Ill.) 351; s. c., 48 Am. Dec. 339; *Attorney-General v. Railroad Co.*, 3 Greene (N. J.) Eq. 136; *Attorney-General v. Hunter*, 1 Dev. Eq. 12; *Minke v. Hofeman*, 87 Ill. 450; s. c., 29 Am. Rep. 63. And this rule applies to actions by private individuals, and to suits for the benefit and in behalf of the public.

III. It is further claimed that the statute is invalid because it authorizes an action to be brought by any citizen of the county, without a showing that he is especially damaged by the nuisance. What we have said with reference to the power of the legislature to enlarge the jurisdiction of a court of equity will apply with the same force to this objection. It is surely within the power of the legislature to designate the persons at whose suit a nuisance may be enjoined and abated. The reason of the rule which formerly obtained, that a private action will not lie for a public nuisance without special damages, was that to authorize private actions would create a multiplicity of suits, one being as well entitled to bring an action as another. *South Carolina R'y Co. v. Moore*, 28 Ga. 418.

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But because the enforcement of a statute may create a multiplicity of actions is no ground for declaring it unconstitutional. Questions of policy or expediency in legislation are for the law-making power itself, and courts have no authority to interpose their judgment against that of the legislature, upon the ground that the law in question may be inexpedient, or that some other enactment would better serve to accomplish the desired object.

But there is another view of this question which must not be overlooked. There can be no doubt that it is within the power of the legislature to designate the person, or class of persons, who may maintain actions to restrain and abate public nuisances, and when that is done the action is for all purposes an action instituted in behalf of the public, the same as though brought by the attorney-general or public prosecutor. We are strongly inclined to think that in this case a decree for the defendant would be a bar to any other like action for an injunction, upon evidence of sales of liquor within the same time as is embraced in this action. The plaintiff is by law made the representative of the public in bringing and maintaining the action.

IV. Lastly, it is claimed that there is no authority for the issuance of a temporary injunction, and that there can be no injunction until after a conviction for unlawful sales of intoxicating liquors. We have already said that the action in equity is independent of criminal prosecutions, and it is wholly immaterial whether the defendant has been convicted or not. We think the temporary injunction was properly allowed. Section 3391 of the Code, by plain implication, authorizes a temporary injunction in actions to restrain a nuisance. This is an action for an injunction only. No damages are claimed, and no other relief is demanded. The law denounces the unlawful maintenance of a saloon or dram-shop as a nuisance. The plaintiff, in his own behalf and in behalf of other citizens, demands that the defendant cease from pursuing his unlawful and criminal occupation, and he prays that a temporary injunction be allowed. It plainly appears from the petition that the defendant, when the petition was presented to the judge, was and had been a defiant, persistent and open violator of the law. In view of these facts, the showing made for the issuance of the temporary writ was sufficient, under section 3388 of the Code. The law having denounced the defendant's calling and occupation as a nuisance, in the judgment of the law he was every day doing acts which produced great and irrepa-

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nable injury to the plaintiff and other citizens; injuries that in the judgment of the legislature ought to be enjoined and prevented by an action in equity. No earthly power is able to repair the injury which may be done by the maintenance of the nuisance from the commencement of the action until the final decree, and for that reason a temporary injunction is authorized by the law.

We have disposed of every question made by counsel in the case. We have pursued a different order in the discussion of the case from that adopted by counsel, and have not reviewed nor commented upon all the authorities cited; but we think we have fairly disposed of every question presented. The case has been exhaustively and ably argued, orally and in print, and we have given it our most careful consideration; and keeping in view that important and oft-repealed rule, that no court is authorized to declare an act of the legislature invalid unless it is plainly, palpably and beyond doubt repugnant to some provision of the Constitution, we reach the conclusion that the court below did not err in entertaining the action and in granting the temporary injunction.

Judgment affirmed.

 MOORE V. CHICAGO, QUINCY & BURLINGTON RAILWAY COMPANY.

(65 Iowa, 505)

*Contract — to take into employment in consideration of release of damages —
defense of incompetency.*

In settlement of a suit for personal injuries, the defendant railroad company agreed to employ the plaintiff as baggagemaster and express messenger. In an action for breach of that contract, the defendant set up that the plaintiff was incompetent. *Held*, (1) Expert opinions on that question are inadmissible. (2) The defendant was bound to afford him a reasonable opportunity to acquire the requisite knowledge and skill.

ACTION for breach of contract. The head-note states the case. The plaintiff had judgment below.

T. B. Perry, for appellant.

J. E. Townsend and *John F. Lacey*, for appellee.

REED, J. The evidence given on the trial shows that plaintiff informed defendant in the month of December, 1882, and at other

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times between that and the first of the following July, that he was able to go to work as express messenger and baggage-man, and that he desired to be employed in that capacity under the contract between the parties. Shortly before the first of July he was directed by one of defendant's agents to hold himself in readiness to go to work, and on the second of that month he was directed to take charge of the baggage and express business on defendant's road from Albia to Des Moines. The baggage and express matter are carried on that route in the same car, but the express business is conducted by the American Express Company. The train on which plaintiff went to work makes one trip daily from Albia to Des Moines and return. On the trip on July 2, a route agent of the express company, also another employee of the company, accompanied plaintiff, riding with him in the express and baggage car, and rendered some assistance in handling the baggage and express matter, and the route agent gave plaintiff some directions as to the proper manner of doing the work and transacting the business. The route agent also accompanied plaintiff on the trip the next day. But when they arrived at Des Moines plaintiff quit the work. Whether he quit voluntarily, or was discharged by the route agent, is in dispute between the parties. But the jury found that he was discharged, and the verdict in this respect finds sufficient support in the evidence.

It frequently happens that single pieces of baggage, weighing as much as two hundred and fifty pounds, are carried on the car, and the express business done on the line is quite extensive. The handling of the baggage requires the exercise of a good deal of physical strength, and a good deal of dispatch is required in the transaction of the express business to avoid delaying the train unduly at the different stations. The express messenger is also required to make duplicate way-bills of such express matter as is received at certain stations on the line, and to enter them upon his delivery book. This writing must be done while the train is in motion, and as these bills and entries constitute the company's record of the business, it is important that the writing should be legible.

It was claimed by defendant that plaintiff did not possess the physical strength requisite for the handling of the baggage, and that he possessed neither the skill nor activity required in the proper transaction of the express business, and that he could not write a legible hand.

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The route agent and the other employee of the express company, who accompanied plaintiff on the second of July, were examined as witnesses on defendant's behalf. It was shown that they each had had long experience as express messengers and baggage-men on railroads, and that they were well acquainted with the amount and character of the business done on the route from Albia to Des Moines. Defendant asked these witnesses a number of questions, with the view of eliciting their opinions as to the ability and capacity of plaintiff to perform the duties of baggage-man and express messenger. They were asked whether, in their opinion, he possessed the qualifications and capacity and fitness to discharge the duties devolving on an express messenger and baggage-man, and whether in their opinion he possessed sufficient physical strength to handle the amount of baggage which was carried on that route. But these and other similar questions were excluded by the Circuit Court, on plaintiff's objection, on the ground that the subject to which they related was one on which the mere opinions of the witnesses were not competent evidence. This ruling is assigned as error. In our opinion the ruling is correct.

The questions related exclusively to plaintiff's fitness for the position of baggage-man and express messenger, and his capacity to perform the duties of that position. This we think was in no sense a question of science or skill, or one upon which inexperienced persons are incapable of forming a correct judgment without the aid of the opinions of experts. Nor is it one in which the facts, from which the judgment or opinion must be formed, cannot be fully presented to the jury. The ground upon which it is claimed that the opinion of the witnesses should have been admitted is that they were well acquainted with the amount and character of the business done on the route, and knew also the degree of skill and strength and activity which must be exercised in the proper performance of the labor, and they had also seen plaintiff in his attempt to perform the duties of the position; and consequently they were in a position to form a correct judgment as to his fitness and capacity to perform those duties. Under this claim however the opinion of the witnesses would be specially valuable, not because of any special study or examination which they had given to the subject, but because they were in possession of all the facts which should be considered in forming a judgment or opinion on the subject. But these facts were all capable of being communicated to the jury; and the witnesses did

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state the amount and character of the express business done on the route, and the amount and weight of the baggage which the baggage-man was required to handle, and the time within which the work was required to be done, and the manner in which it should be done, and the other facts which should be considered in forming a judgment as to the strength and skill and activity which must be exercised in performing the duties. They also stated the facts with reference to the manner in which plaintiff did the work while they were with him, and which led them to conclude that he was not capable of properly performing the duties of the position.

As the question of plaintiff's fitness for the position was to be determined from these facts, it was clearly the province of the jury to determine it. It was for them and not for the witnesses, to determine what conclusions or deductions should be drawn from the facts which were established. In excluding the evidence of the opinions of the witnesses the Circuit Court followed the rule on the subject as heretofore laid down by this court. See *Muldowney v. Illinois Cent. R'y Co.*, 36 Iowa, 462; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 31; *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 662.

II. The court instructed the jury that it was the duty of the defendant, under the contract between the parties, "to afford plaintiff a reasonably fair opportunity to learn the business, and to discharge the duties of baggage and express man on its road, and that if it discharge him from its service without affording him such opportunity, it was liable. But if it afforded him such opportunity to learn the business and discharge the duties of the position and he was not able to discharge such duties with reasonable promptness and ability, and it discharged him for that reason, he could not recover." Defendant assigns the giving of this instruction as error. It is argued by counsel that under it defendant was required to take plaintiff into its employment and give him room in its baggage and express car while he was merely learning the duties of the position of the baggage-man and express messenger; but we think this is not the meaning of the instruction. The character of the duties of the position is shown by the evidence. It is the duty of baggage and express men to receive and care for the baggage which is carried on the car, and deliver it at the station to which it is consigned, and to receive, care for and properly deliver the express matter which is carried on their route, and to make the necessary way-bills and en-

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tries in the book which they are required to keep. A good deal of the work performed by them in the discharge of the duties of the employment consists of mere manual labor; and no previous preparation is required to fit the messenger to perform it. There are other duties however which require business knowledge and capacity for their proper performance; but this knowledge the messenger is expected to acquire while in the actual performance of the duties. 'The business is not one to which men serve an apprenticeship; but intelligent, active men, possessing the requisite physical strength, may enter into it without previous special preparation, and by attention to its duties they soon acquire the skill and knowledge required for their proper performance. The instruction in question means simply that defendant was bound to afford plaintiff a fair opportunity to acquire this knowledge and skill in the manner in which it is ordinarily acquired by men in that service; and we think it is correct.

[Omitting minor matters.]

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

FORCHHEIMER V. STEWART.

(85 Iowa, 594.)

Sale—warranty—delivery to carrier.

The plaintiff, at Mobile, Alabama, ordered from defendant at Council Bluffs, Iowa, through his agent at Mobile, "choice sugar-cured canvassed hams." The plaintiff had no opportunity to inspect them, but they were shipped at Council Bluffs, and payment was demanded and made while they were in transit. *Held*, that the hams were warranted to conform to the order, and defendant was liable for a breach.

ACTION for breach of warranty. The opinion states the case. The defendant had judgment below.

Sims & Cadwell, for appellants.

Sapp & Pusey, for appellee.

ADAMS, J. The plaintiffs are provision dealers, residing and doing business in the city of Mobile, Alabama. The defendant is

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a pork-packer, residing and doing business in the city of Council Bluffs, Iowa. In August, 1881, he entered into a contract through his broker, one O. Wilson, located at Mobile, for the sale of a large quantity of hams, and shipped the same on the nineteenth day of that month. The hams arrived in Mobile in due course of transportation, and in about ten days. The plaintiffs had paid for them on the twenty-fourth of that month, and while the same were in transit. They aver that they purchased the hams as "choice, sugar-cured, canvassed hams," and that when the same were delivered to them they were unsound, tainted and unmerchantable. They introduced evidence tending to show that the hams, without their fault and without the fault of the carrier, had upon their arrival at Mobile become sour, tainted and skippery. They also introduced expert evidence tending to show that hams properly cured, and properly treated afterward, will keep through the summer months, and that too though transported to a southern market like Mobile; and that if they are choice hams they will keep even longer than that.

The defendant, on the other hand, introduced evidence tending to show that the hams were properly cured, and were in good condition when shipped at Council Bluffs. As to when, if at all, the hams became unsound, there was no direct evidence whatever. As will be seen it became important to determine with what warranty, if any, the hams were sold and delivered, and if with a warranty, whether the hams delivered were of the quality warranted at the time they were delivered; and in this inquiry it will be seen that there was involved another, and that is as to the time when the hams should be deemed to have been delivered. The plaintiffs contend that there was an express warranty that the hams were choice, sugar-cured, canvassed hams. The defendant denied that there was any express warranty. Again, the plaintiffs contend that the delivery to them took place when the hams were received by them from the carrier at Mobile. The defendant contends that the delivery to them took place when the hams were delivered to the carrier at Council Bluffs. Respecting this matter of delivery, the undisputed fact appears to be that the defendant took from the carrier a bill of lading, or shipping receipt, in his own name, whereby the hams were made deliverable to him or his order. This bill of lading the defendant indorsed in blank, to it he attached a sight draft, which he drew upon the plaintiffs, for the

purchase-price of the hams, and delivered the same to his banker in Council Bluffs in the usual way of such business, and received credit therefor in his bank account. The draft and bill of lading were forwarded by the bank to its correspondent in Mobile, and by the latter were presented to the plaintiffs, who, after some hesitation and negotiation, paid the draft and received the bill of lading.

I. Upon this state of facts the court instructed the jury in these words: "When the bill of lading was delivered to the plaintiffs, the property in the merchandise was vested in them, and the carrier who had it in possession for transportation was their agent, and the delivery of the goods was completed at that time, and the inquiry must be whether at that time the goods corresponded in quality with the warranty." The giving of this instruction is assigned as error. Where the shipper retains the right of disposing of the property while in the hands of the carrier, there is, of course, no delivery to the consignee. The object usually which the shipper has in taking the bill of lading in his own name, when he does so, is to enable him to retain such right. What the defendant's object was, there can be no doubt. He proceeded at once to transfer the bill of lading to the bank as security for the draft, the amount of which was credited to him in his bank account. There was then no delivery made to the plaintiffs by delivery to the carrier at Council Bluffs. The rule is very clearly expressed in *Merchants' National Bank v. Bangs*, 102 Mass. 295. COLT, J., said: "If the bill of lading, or other written evidence of the delivery to the carrier, be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of an intention to transfer an absolute title to the vendee. But the vendor may retain his hold upon the goods to secure the payment of the price, although he puts them in the course of transportation to the place of destination by delivery to the carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt in his own or some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement, to the purchaser, and in all cases, when he manifests an intention to retain this *jus disponendi*, the property will not pass to the vendee." See also *Benj. Sales*, § 399, and cases cited.

Having reached the conclusion that the goods were not delivered

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by the defendant to the plaintiffs by delivery to the carrier at Council Bluffs, we come to inquire whether they were delivered by delivery to them, later, of the indorsed bill of lading. In our opinion they were. The defendant, from the time of such delivery, had no right or interest in the goods, and the *jus disponendi*, or right of disposing of the goods, had become absolute in the plaintiffs. The goods could not be sold or incumbered by the defendant, nor properly taken upon attachment or execution by his creditors. This being so, it would seem to follow that the risk of damage from the elements, in the absence of any agreement to the contrary, should be borne by the plaintiffs.

It is true that the plaintiffs could not be considered as having had an opportunity to inspect the goods at the time when the transfer was made to them of the bill of lading. But we do not see how the plaintiffs' inability to inspect at that time could give the transfer of the bill of lading an effect different from what it otherwise would have had. The plaintiffs were not bound to accept the transfer at that time. The defendant had put the goods in transit without a tender of delivery. The plaintiffs might unquestionably have withheld payment of the draft and acceptance of the bill of lading until the goods reached their destination. But for reasons satisfactory to themselves they preferred to pay in advance. It was their right to do so if they preferred, and secure whatever advantages there might be from such payment and such acceptance. But in securing those advantages we think they took upon themselves whatever risk there might be of damage from the elements from that time forward.

We ought to say in this connection, that the plaintiffs claim that they declined at first to pay the draft and accept the bill of lading, and were induced to do so at the time they did only by an agreement on the part of the defendant that he would protect them, which agreement they construe as meaning that the defendant would guarantee that the goods should be laid down in good condition at Mobile. Some evidence was introduced for the purpose of proving such agreement. But the plaintiffs' difficulty is that they do not declare upon such agreement. They barely allude to it, and they seem to treat it as a mere circumstance, to be taken with others, as tending to show that no delivery took place until the goods reached Mobile. But the agreement, if it had any effect, merely charged the defendant with the risk of damage from the

elements during the remainder of the transportation. We think that the instruction given as to the time when delivery took place was correct, and that the plaintiffs could not be aided by the agreement referred to, without setting the same up as a cause of action.

II. We come now to consider whether there was evidence tending to show a special warranty of these hams. The court below instructed the jury, in effect, that there was not. The hams contracted to be sold were represented by the defendant's broker, Wilson, to be "choice, sugar-cured, canvassed hams." Wilson claimed to be authorized by the defendant to contract for the sale of such hams, by a certain letter and certain telegram received by him from the defendant. A letter and a telegram were introduced in evidence. In the letter, under date of July 11, being that in which the broker was employed by the defendant to sell hams, the defendant, in describing his hams, said: "I have no winter product except hams, sugar-cured canvassed. They are very fine." In the telegram defendant said: "Hams strictly choice." The court instructed the jury in these words: "The original authority which the defendant gave the broker clearly appears to have been in writing, and is contained in the defendant's letter to the broker of July 11, which is in evidence. While this letter contains language which is commendatory of the merchandise, it does not contain authority to the broker to sell it with a special warranty."

A representation as to the quality of goods by the use of the word "choice" may or may not be a warranty, according to circumstances. The use of such word by the seller respecting goods which the buyer was inspecting, or might be presumed to inspect, would not ordinarily be a warranty. It would be a mere expression of opinion respecting the quality of which the buyer should judge for himself. There would be no end to litigation if all words of commendation used by sellers were construed as warranties. But there are circumstances under which it is the right of both parties that representations respecting quality made by the seller should be regarded as statements of fact which may be relied upon by the buyer. This is so where the buyer is ignorant of the quality, and cannot be presumed by the seller to inform himself or acquire knowledge of it except through the representations of the seller. But the question before us does not to our mind involve precisely the principle above stated. At the time Wilson made the contract in question the goods had not been designated. It was not a con-

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tract for specific goods of the quality of which the buyers could take notice. It was a mere executory contract for goods of a certain quality, and the seller was at liberty to fill it with any goods he saw fit, provided only they were of the kind and quality he contracted for. The case differs in no essential respect from one where the buyer makes an order for goods of a certain kind and quality, and the seller accepts the order. The obligation of the seller is to execute the contract upon his part by a selection and delivery of the goods of the kind and quality contracted for. Such contract is not in the outset a sale with a warranty; it is executory. It becomes an executed sale upon delivery; and if the delivery is made under circumstances which preclude inspection, we think that a warranty arises that the goods are of the quality contracted for. If in the case at bar, the plaintiffs contracted for "choice, sugar-cured canvassed hams," the defendant was bound to select and deliver such. And when he drew a draft against them, and caused the draft to be presented, and he accepted payment thereon at a time when the goods were in transit, we think that a warranty arose that the goods thus shipped and drawn against while in transit were of the quality contracted for.

What the defendant's communications to his broker were, concerning the quality of hams which he desired to offer through him in the Mobile market, we think that there was no doubt. But we do not desire to rest our decision expressly upon these communications. It is enough for us to know that the defendant constituted him his agent at Mobile to take orders for and contract to sell hams; and the order which the agent took from the plaintiffs was for choice, sugar-cured canvassed hams. No one would claim that where a principal should appoint an agent to contract for the sale of wheat and such agent should contract for the sale of No. 1 wheat, the contract could be properly executed by the delivery of an inferior grade. An agent appointed to contract for the sale of hams is clothed with apparent authority to contract for the sale of at least the usual grades known in the market and especially for the sale of such a grade as that in question, where the hams are to be shipped in summer to a distant southern market. It would be a reproach to the law to hold that a seller under the circumstances shown was not bound to fulfill his agent's contract as made. Neither buyers nor sellers desire such rule established as that contended for. It would go far toward destroying all confidence in an important

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mode of trade. In our opinion then the instruction which the court gave, to the effect that there was no special warranty, cannot be sustained. Nor do we think that the instruction given was without prejudice. It is true, that under other instructions the jury must have found that the hams were merchantable on the day the bill of lading was accepted by plaintiffs. But the plaintiffs contracted for a superior grade, and the evidence tended strongly to show, that if the hams had been of such a grade, they would not have been unsound, tainted and skippery on the day they arrived.

Judgment reversed.

COMMERCIAL EXCHANGE BANK V. MCLEOD.

(65 Iowa, 685.)

Attachment — property taken from person of prisoner.

Where a sheriff, on committing the defendant to jail, took his watch and money, in no way connected with the crime and not used as evidence, his possession was that of the prisoner, and they were not subject to attachment in an action against the prisoner.

MOTION to discharge property from attachment. The opinion states the case. The motion was granted below.

Blythe & Markley, for appellant.

Glass & Hughes, for appellee.

ROTHROCK, C. J. On the 31st day of January, 1883, the plaintiff commenced an action against defendant and others upon a promissory note. It was alleged in the petition that defendants had disposed of their property in part with intent to defraud their creditors, and a writ of attachment was prayed for and issued, which was placed in the hands of the sheriff for service. The plaintiff is a partnership and H. P. Kirk and I. R. Kirk are the individual members thereof. On the 28th day of August, 1883, said I. R. Kirk made and filed information before a justice of the peace, charging the defendant with the crime of uttering a forged promissory note. A warrant was issued and the plaintiff was arrested by a constable and taken to the county jail. Upon his commitment to

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the jail, the sheriff, who was the keeper thereof, proceeded to search the defendant's person, and took therefrom one gold watch, one silver watch, and \$480 in money, and having the attachment and money and property all in his hands, he made return that he had levied the attachment on the watches and money.

Section 4212 of the Code provides: "He who makes an arrest may take from the person all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law." We do not think that an officer making an arrest is precluded by this statute from taking from the person of the prisoner any other property than "offensive weapons." An officer in making an arrest, or a jailer upon committing a person to jail, may search him and take from him all property which might be used by the prisoner in effecting an escape. In *Reifsnnyder v. Lee*, 44 Iowa, 101, the defendant stole five heads of cattle and sold them to the plaintiff for \$162.30. The owner of the cattle claimed and recovered them from plaintiff, and the plaintiff procured officers to pursue and capture the thief. The officers making the arrest searched his person, and took therefrom certain money and a watch which was of little value. It was held that the money and watch were liable to garnishment in the hands of an officer at the suit of plaintiff. In that case the search of the person was fully approved. It is said however in the opinion, that "a party to a suit can gain nothing by fraud or violence under the pretense of process, nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and positions they possessed and occupied before they were deprived thereof by the fraud, violence or abuse of legal process." To the same effect see *Pomroy v. Parmlee*, 9 Iowa, 140, and *Patterson v. Pratt*, 19 Iowa, 358.

We think the sheriff was justified in making the search, and in taking from the person all money or property which was in any way connected with the crime charged or which might serve to identify the prisoner. If however the sheriff knew that the watches and money were in no manner connected with the crime, and that they could not be used in any way as evidence in the prosecution, we think it was his duty to return them to the defendant. If a constable or other officer takes possession of property found on a prisoner, the court will order the same to be restored, if not required as a means of proof at the trial, or which does not finally appear to

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be the fruits of the crime of which he stands charged. 1 Arch. Crim. Pl. and Pr. 34, 35.

In the case of *Reifsnyder v. Lee, supra*, it is said there was "ample ground to hold that the money taken from Lee was the money which he had procured from plaintiff for the stolen cattle."

In the case at bar, it is not claimed that the sheriff had any right to retain the money and watches for any purpose connected with the arrest or with the crime charged. It is claimed however that the defendant consented that the sheriff might take possession of the same and keep them for him. This is denied by defendant and there was a conflict of evidence upon this point, and it cannot be said that the court was not warranted in finding that the property and money were taken without the consent of defendant. Where a party submits to a search of his person by an officer, it cannot be said that the search was with his consent, because he makes no physical resistance; and when the search is completed and the fruits thereof are retained by the officer, it would require a strong showing to hold that this was with the consent of the prisoner.

We think that it cannot be said that the search was unlawful. But when it was ascertained that the money and property were in no way connected with the offense charged, and were not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets. To hold otherwise would lead to unlawful and forcible searches of the person under cover of criminal process, as an aid to civil actions for the collection of debts. It does not appear that such was the purpose of the prosecution in this case, but the court was justified in finding that the money and property were taken from the defendant by force and without his consent, and as it is not claimed that the money or property was in any way connected with the crime charged, no advantage should be taken of the defendant because the same was taken from his person by force and against his will.

Judgment affirmed.

REHEARING.

SEEVERS, J. A more particular statement of facts than is set forth in the foregoing opinion may be beneficial. The attachment was issued in July. In August the information was filed, charging

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that the defendant, Ridgway, had committed the crime of uttering a forged promissory note. The defendant was searched, and the money and watch taken from his person by the officer, and in September the money and watch were attached. The court was warranted under the evidence in finding that the money and watch had no connection with and that they were not fruits of the crime charged. The search was justifiable, and possibly the officer, in his discretion, could retain, for a time at least, the property if thereby the defendant might be aided in effecting his escape, or if it would tend to connect him with the commission of a crime. But the possession of the officer was the possession of the defendant. This is the undoubted rule, as appears from the authorities cited in the foregoing opinion, and it is sustained also by the following: Whart. Crim. Pl. & Pr., § 61; 1 Bish. Crim. Pr., §§ 210, 211, 212. The foregoing rule of the common law may, of course, be changed by statute; but this has not been done and therefore the rule above stated must prevail.

Reifsnnyder v. Lee, 44 Iowa, 101, cited in the foregoing opinion and on which the defendant relies, is clearly distinguishable. In that case the defendant was charged with the larceny of cattle, and it is said in the opinion "there is ample ground to hold that the money taken from Lee was money which he procured from plaintiff for stolen cattle." The money was obtained by the commission of the crime, and as the officer was authorized to make the search, his possession of the money was lawful, and it could be attached and appropriated by the party from whom it was unlawfully obtained. The foregoing opinion is adhered to.

MORRIS V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

(65 Iowa, 737.)

Jurisdiction — negligence — remedy under statute of another State.

An action may be maintained in Iowa for negligently killing a man in Illinois, the statutes of both States allowing such remedy in substantially the same form.

ACTION for death of plaintiff's intestate by negligence. The opinion states the point. The plaintiff had judgment below.

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Wright, Cummins & Wright, for appellant.

Baylies & Baylies, for appellee.

ROTHROCK, C. J. [Omitting minor points.] The next question presented by counsel for appellant is, can an action be maintained in Iowa, by an Iowa administrator, upon this claim arising under the statute of Illinois? The statute of the State of Illinois authorizing actions for damages for the death of a person, caused by the wrongful act, neglect or default of another, is as follows:

“Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in such case, the person who, or company or corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.”

“Sec. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; provided that every such action shall be commenced within two years after the death of such person.”

Michael Quigley, the deceased, left a widow and parents surviving him, and it is not disputed that an action would lie in the State of Illinois by an administrator appointed in that State. The law expressly so provides. Under the law of this State, “when an act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts.” Code. § 2526. It will thus be

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seen that in both States the administrator of the deceased is the proper party plaintiff in the action, and it seems to us to follow that in both jurisdictions the administrator is required to receive the amount recovered, and distribute it as provided by the respective statutes. By the statute of Illinois the assessment of the recovery is limited to \$5,000. No such limitation is placed upon the statute of this State. By the statute of Illinois the recovery shall be for the exclusive benefit of the widow and next of kin of the deceased, while in Iowa the recovery shall be disposed of as other personal estate, except that it shall not be liable for the payment of debts, if the deceased leaves a husband, wife, child or parent. This distribution of the recovery by the administrator in this case would therefore be to the same persons as if the administration and action were had in the State of Illinois, and a judgment in this State would be a bar to an action in Illinois.

The plaintiff pleaded the statute of Illinois in his petition, and made his proof that the deceased left a wife and parents surviving him, and the court instructed the jury, in effect, that the recovery must be had as provided by the Illinois statute. The case differs from that of *Hyde v. Railroad Co.*, 61 Iowa, 441; s. c., 47 Am. Rep. 820, where we held that no recovery could be had in the courts of this State for an injury resulting in death in Missouri, because in that case, recovery was claimed under the statute of this State, and we held that if an act of the character complained of, done in that State, did not create a liability there, there was no liability anywhere.

In *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; s. c., 38 Am. Rep. 491, where an action was brought in that State against the defendant by an administrator for damages for a wrongful act causing the death of the intestate in the State of Connecticut, it was held that the action could be maintained. The ground of the decision is that although the right of action did not exist at common law, but was created by statute, yet it was transitory in its nature, and could be enforced in a foreign country where the laws of the country are of a similar nature. In other words, it is held that the action will lie unless the law and policy of the forum forbids its maintenance. The court said: "The rule here laid down is just and reasonable, and it is not essential that the statute should be precisely the same as that of the State where the action is given by law, or where it is brought, but merely requires that it should

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be of similar import and character." It appears that there was such a law in the State of New York.

In *Dennick v. Railroad Co.*, 103 U. S. 11, plaintiff as administrator, brought suit in the State of New York to recover damages for the death of the intestate by an accident on the defendant's road in New Jersey. It was contended that the action would not lie because it was only cognizable in the courts of New Jersey. It was held that the action could be maintained, and the decision is placed upon the broad ground that the action is transitory, and may be maintained in any forum, and that the venue is immaterial. We think that it has been generally held that where a right of action accrues by virtue of a statute of any State, the action may be maintained in any other State, if not contrary to the public policy or law of the place where suit is brought. See *King v. Sarria*, 69 N. Y. 24; s. c., 25 Am. Rep. 128; *Phillips v. Eyre*, L. R., 6 Q. B. 1; *Wall v. Hoskins*, 5 Ired. Law, 177; *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11; s. c., 47 Am. Rep. 771; *Boyce v. Wabash Ry. Co.*, 63 Iowa, 70; s. c., 50 Am. Rep. 730. In the last-named case, we cited with approval the cases of *Dennick v. Railroad Co.* and *Leonard v. Navigation Co.*, *supra*. It is not to be denied that there are cases not in accord with the rule of those above cited. See *Woodard v. Michigan S. & N. I. R. Co.*, 10 Ohio St. 121; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, and *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kans. 46; s. c., 26 Am. Rep. 742. The decisions in these and other cases relied upon by counsel for appellant we cannot approve, and we expressed our dissent from them in *Boyce v. Wabash Ry. Co.*, *supra*.

It is not necessary that we should go further in this case than to hold that the action can be maintained, because the recovery sought is in accord with our laws and the policy of our State, and yet we think, as is said in *Dennick's* case, *supra*: "It would be a very dangerous doctrine to establish that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred."

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

PARKER V. STATE.

(77 Ala. 47.)

Criminal law — bigamy — evidence of first marriage — proof of continuance.

On a prosecution for bigamy the first marriage may be established by the defendant's admissions.

Positive evidence that the former husband or wife was alive at the time of the second marriage is not essential. The fact may be made out by presumption and circumstances.

CONVICTION of bigamy. The opinion states the case.

E. T. Taliaferro, for appellant.

T. N. McClellan, attorney-general, for State.

CLOPTON, J. When marriage constitutes an essential ingredient of a criminal offense, a marriage in fact, valid according to the laws of the country where contracted, must be proved by competent evidence, beyond reasonable doubt. In respect to the competency of the confessions of the defendant, as evidence of the first marriage in a prosecution for bigamy, the authorities both in England and this country have differed. The weight of authority is in support of the proposition that in the absence of local laws prescribing

formalities and ceremonies to validate a marriage, the first marriage may be proved by the admissions of the accused. *Miles v. U. S.*, 103 U. S. 304. A review of the authorities will not serve any useful purpose, as the rule that such confessions, when voluntary and properly identified, are admissible in evidence on the same principle and in like manner as other confessions, may be regarded as settled in this State. In *Langtrey v. State*, 30 Ala. 536, it was held, that in prosecutions for bigamy, marriage may be proved by cohabitation and the confessions of the party; and if the proof be full and satisfactory, it is not necessary to produce either the record of the marriage or the testimony of a person who was present. And in *Williams v. State*, 54 Ala. 131; s. c., 25 Am. Rep. 565, it was held, that as by the common law, consent, followed by cohabitation, constitutes a valid marriage, the admission of a marriage in a State where the common law is presumed to exist, is the admission of a fact which may rest in parol only, of which there is not necessarily higher evidence; that such admissions are competent evidence of a marriage, and that the jury were to determine whether they involved an admission of its validity. Cohabitation and reputation alone may not be sufficient, as cohabitation frequently occurs without marriage, and the relation of husband and wife is sometimes assumed to avoid scandal and social ostracism. The presumption of marriage from cohabitation and reputation is more or less strong according to the accompanying circumstances; but confessions of marriage may be supplemented and strengthened by proof of cohabitation and reputation. The admissions of the defendant, of a first marriage in North Carolina, were admissible in evidence, there being no proof of any statutory regulations. No question is raised as to the voluntary character of the confessions; and the sufficiency of the confessions and former admissions, to establish the fact and validity of the first marriage, was for the determination of the jury. If sufficient to satisfy them beyond a reasonable doubt, no other evidence is necessary. *Williams v. State, supra.*

2. Proof that the first wife was living at the time of the second marriage is essential to conviction. Direct and positive evidence is not indispensable. The fact may be shown by circumstantial evidence. By the common law, the continuation of life ordinarily is presumed until death be shown. An exception, borrowed originally from the statutes in relation to bigamy, is the presump-

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tion of death after an absence of seven years without having been heard from. By our statute, any person who did not know at the time of the second marriage, that his or her former wife or husband was living, and whose former wife or husband had remained absent from him or her for the last five years preceding such second marriage, may lawfully marry a second time. Code, § 4186. To constitute the statutory exception an available defense, continuous absence for the last preceding five years, and ignorance of the life or death of the former husband or wife, must concur. When the prosecution proves that the former husband or wife was alive at a specified period before the second marriage it is incumbent on the defendant to show either death, or a continuous absence for the period prescribed by the statute. Says Mr. Wharton: "A party who marries within the time limited by the statute does so, so far as this exception is concerned, at his own risk. * * * Hence, on an indictment for bigamy, the death of the husband, if claimed to have occurred within seven years from his absence, must be proved as any other fact, aside from the legal presumption created by the exception to the statute." 2 Whart. Crim. Law, §§ 1704, 1705. And in *Jones v. State*, 67 Ala. 84, BRICKNELL, C. J., construing our own statute, says: "Whoever marries a second time, having a former husband or wife living, absent for a less period than five years, violates the statute, and is subject to punishment."

It is not meant there are no cases, in which death will be presumed from unexplained absence for a less period than five years. Questions of conflicting presumptions may arise; and the accompanying circumstances as to age, or health, or condition may be such that the presumption of innocence will overcome the presumption of the continuance of life. A consideration of the circumstances under which the one presumption will countervail or overcome the other, is unnecessary, as no question of conflicting presumption arises on the record. Absence from which death is presumed, is absence abroad; absence from the former place of abode, where nothing has been heard of the absent person by those who would naturally have heard of him, if alive. If the defendant left his wife in North Carolina, where they formerly resided, and absented himself from that State, the presumption of her death cannot arise by reason of his absence, or of his having heard nothing from her. To create such presumption, it is necessary to prove her absence abroad, without being heard from, during the statutory

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period, or under such circumstances as will authorize the presumption of death within a shorter period. There was no evidence that the wife had been absent abroad for any length of time; and the confessions of defendant tended to show he had corresponded with her, to a short time before the second marriage, not exceeding a month. In such case, the wife being shown to be alive at a specified period before the second marriage, life is presumed to continue, and death, if claimed, must be proved as any other fact. A husband cannot create absence by abandoning his family, and then invoke the presumption of innocence to destroy the presumptive proof of continuing life. On such facts, there can be no inference of death, available as a defense; and the presumption of innocence only avails as in other criminal cases — that each essential ingredient of the offense must be proved beyond a reasonable doubt.

The charges numbered five, six and ten, requested by the defendant, were properly refused. They were tantamount to instructions, that positive evidence that the former wife was living at the time of the second marriage is necessary, and that the jury could not find such fact from proof that she was alive a short time prior thereto. The other charges requested assert propositions in conflict with the principles of this opinion. There is no error in the charge given at the request of the prosecution.

[But on another ground the conviction was reversed and remanded.]

Reversed and remanded.

BAYSINGER V. STATE.

(77 Ala. 68.)

Criminal law — forgery — capacity to deceive.

An order written dimly in pencil, asking the person addressed to send by the bearer, the defendant, “\$450 cents,” and signed by a name which appears to be G. W. McGowe, has the capacity to deceive, and is sufficient to support an indictment for forgery, with the additional averments that the amount called for was intended for \$4.50, and that the name signed to it meant G. W. McGowen. (*See note, p. 48.*)

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CONVICTION of forgery. The head-note shows the case.

W. S. Cary, and W. T. Johnson, for defendant.

T. N. McClellan, attorney-general, for State.

STONE, C. J. The defendant was indicted for the forgery and uttering of an order purporting to be made by one G. W. McGowen, with intent to defraud. The order has been sent up for our inspection, by order of the trial court. It is in pencil, and very dim. A substantially correct copy is set out in each count of the indictment. The question raised, and urged here for a reversal, relates to the sufficiency of the paper to deceive and defraud. It is contended that the alleged order is ambiguous and incomplete in two respects: First, in the sum of money it calls for, and second, in the name of McGowen, which the indictment charges was forged.

In Clark's Manual, § 1148, it is said: "An appearance of validity on its face is enough to make the instrument a subject of forgery." In the same section it is said: "The law looks only to the falsity of the instrument, and the fraudulent use of it as genuine." In *Com. v. Stephenson*, 11 Cush. 481, it was decided, that "a person may be convicted of forging a check on a bank, although the counterfeit does not so much resemble the genuine check of the drawer as to be likely to deceive the officers of the bank on which it is drawn." So in Clark's Manual, § 1157, quoting from Hawkins' Pleas of the Crown, is this language: "The notion of forgery does not seem to consist so much in the counterfeiting of a man's hand and seal, which may be often done innocently; but in endeavoring to give an appearance of truth to a mere deceit and fraud, and either to impose something false upon the world as the solemn act of another," etc. In *Rembert v. State*, 53 Ala. 467; s. c., 25 Am. Rep. 639, the entire instrument charged to have been forged was in the following language: "Due 8.25 Askew Brothers." There was a conviction, and after an elaborate consideration of authorities by BRICKELL, C. J., the judgment of conviction was affirmed. Speaking of the general rule, that if the instrument is void on its face, it cannot be the subject of a forgery, this court said it must be taken with this limitation: "When the instrument does not appear to have any legal validity, nor show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might

be enabled to defraud another, then the offense is complete, and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported. The fact that the paper is incomplete or imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders it necessary that the indictment should aver the extrinsic facts." So in *Gooden v. State*, 55 Ala. 178, the name attempted to be forged was Thweatt, but the forged instrument had it Threet. There was a conviction, and this court approved the ruling of the court on that question. See also, 3 Greenl. Ev., § 103.

The sum of money called for by the order was thus expressed — "\$450 cents." We think the most natural import of the writing — that which would ordinarily be put upon it — is, that it was an order for \$4.50. The name McGowen is imperfectly spelled. The last letter — possibly the last two — are omitted. The indictment charges that the writer intended, in the words or marks he employed, to express the name McGowen. "Meaning thereby McGowen," is the language of the indictment. The meaning of the writer was thus made a question for the jury.

[But on another point]

Reversed and remanded. Let the defendant remain in custody, until discharged by due course of law.

Reversed and remanded.

NOTE BY THE REPORTER.— In *State v. Schwartz*, 64 Wis. 482, an instrument in the form of a promissory note for the payment of "25.00 as per deed, 10 per cent till paid, was held to be a note for twenty-five *dollars* upon its face. The court said: "The controlling question is therefore, does the forged instrument purport on its face to be a promise by Baggs, the maker, to pay the defendant twenty-five dollars, although it contains neither the \$ mark nor the word 'dollars?' If this question be answered in the affirmative, it is entirely clear that such forged instrument was properly admitted in evidence; that there was no error in the instruction which the court gave the jury; that such alteration constituted the crime of forgery; and that the information is sufficient without an averment therein that the figures 25.00 meant twenty-five dollars. On principle and authority we think the question should be answered affirmatively. *Booth v. Wallace*, 2 Root, 247, was an action on a promissory note for 'thirty-two, twelve shillings and five pence.' The court said: 'The word 'pounds' after the words 'thirty-two' is necessarily implied, and the omission, it is clear, was owing to the mistake of the scribe who drew the note, and the implication is so clear and strong that it is not necessary it should be averred in the declaration more fully than it is.'

"In *Northrop v. Sanborn*, 22 Vt. 488, the question arose on an order request.

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ing the drawee to pay the bearer '37.89,' without any thing else on the face of the order to denote that dollars and cents were intended. The court said, Judge REDFIELD delivering the opinion: 'We think it not necessary to say that the order expressed for 37.89 is so far unintelligible that it is void. The law of the United States Congress establishing our national currency having declared that it shall consist of the dollar as a unit, and the decimal parts of the dollar as dimes and cents, it would seem the necessary legal intendment that a contract expressed in figures should be in the currency of the country. If prefixed by the usual sign (\$), no one *could* entertain doubt; and that is nothing but a mark to signify that the national currency is intended. Without that we think the legal intendment is the same. *Murrill v. Handy*, 17 Mo. 406, was an action on a promissory note wherein the makers promised to pay the payee 'the sum of fifty-two 25-100 for value received.' The word 'dollars' as well as the \$ mark, was entirely omitted. It was held that the note on its face was for fifty-two dollars and twenty-five cents. Some stress was laid upon the words 'the sum' in the instrument; but we think the word 'pay' is equally significant. Other cases to the same effect are cited by the attorney-general, although perhaps they are not so directly in point as are those above referred to.

"The words 'as per deed' in the forged note do not change the character of the instrument. These words merely show that in some deed the maker of the note had incurred the same obligation. The instrument contains all the essential qualities of a promissory note, notwithstanding the reference therein to a deed.

"We are entirely satisfied with the doctrine of the cases above referred to, and do not hesitate to adopt it. We hold therefore that the forged instrument on its face purports to be a promissory note for the payment of twenty-five dollars, and ten per cent interest in money, and that no averment in the information of any extrinsic facts was necessary to show that such was its character and legal effect.

"Numerous cases were cited in argument by counsel for the defendant, and have been examined. They are chiefly to the point, and in illustration of it, that when the operation of the forged instrument upon the rights or property of another is not manifest or probable from the face of the writing, extrinsic facts showing such operation must be averred in the indictment or information. We have here no case for the application of that rule. It is believed that none of the last-mentioned cases conflict with the doctrine of the cases first above cited, on the authority of which we have determined the character and legal effect of the forged instrument in this case."

NATIONAL COMMERCIAL BANK V. MILLER.

(77 Ala. 103.)

Bank—check “for deposit”—certification—garnishment.

A bank receiving from a customer a check on another bank indorsed “for deposit” and procuring it to be certified by the drawee, becomes at once liable to the depositor, as for money had and received, and that liability may be reached by garnishment.

GARNISHMENT proceedings. The head-note shows the case.

J. L. & G. L. Smith, for appellant.

R. H. Clark and Overall & Bestor, contra.

CLOPTON, J. There being no contention as to the check on the Mobile Savings Bank, our consideration will be confined to the relation between the garnishees and the defendant, arising from the facts in respect to the check on the People's Savings Bank, which was certified by the bank. It is conceded that by process of garnishment, which is a proceeding of statutory creation, no debt or demand can be condemned to the plaintiff's claim, for the recovery of which the defendant cannot maintain in his own name an action of debt, or *indebitatus assumpsit*. The question decisive of the case is, was the amount of the check, at the time of the service of the garnishment, a legal demand due by the garnishees to the defendant, which he could enforce in his own name in an action at law?

2. The check, although drawn and delivered to the payee, payable to his order, did not operate without acceptance by the drawee as an assignment of the sum for which it was given, though the drawer may have had funds in his possession of the drawee of an equal or larger amount. There being no privity express or implied, the holder of a check in its original form can bring no suit on the check against the drawee; even if it be conceded that he may maintain an action for any special injury, by reason of the omission of the drawee to perform a legal duty. In case of non-payment, the recourse of the holder is against the drawer, and indorser if any. The drawer alone can bring suit to recover the funds against which the check was drawn; and ordinarily he only can

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maintain an action for a failure to pay on presentment. He may revoke the check and countermand its payment before acceptance ; and if unaccepted his death operates a revocation.

3. The reception from customers of checks on other banks is of frequent and daily occurrence in the business of banking, practiced because of its convenience. In such case an indorsement of the check for the purpose of collection is not an indorsement *animo indorsandi*, and does not pass the title of the payee. In the absence of a special agreement when a check is deposited it is taken generally for collection by the bank as agent of the depositor, and the bank does not owe the amount until its collection is accomplished. It may be that if it is passed to the credit of the depositor, and mingled with the general funds of the bank, it is *prima facie*, a payment on deposit; but the bank may permit, as matter of favor and convenience, checks to be drawn against it before payment; the depositor in the event of non-payment, being responsible for the sums drawn — not by reason of his indorsement, the check not having ceased to be his property, but for money paid. If therefore the check had been deposited with the garnishees for collection, and for no other special purpose, it is manifest that so long as it remained uncollected, and in its original form the amount could not be condemned by process of garnishment.

In what respects and to what extent was the relation changed by the particular indorsement of the check and its subsequent certification ?

The defendant, in the name of "A. Proskauer & Co., agents," opened in January, 1883, a deposit account with the garnishees, who were bankers. On this account the defendant deposited checks payable to "A. Proskauer & Co., agents," which were entered in the pass-book and drew checks in the same name "on funds so deposited." The check in question was indorsed : "For deposit, A. Proskauer & Co., agents." The import and effect of such indorsement must be considered in the light of the attendant circumstances, and of the previous dealings between the parties. Where a depositor has for some time previously kept a deposit account with a banker, on which he was accustomed to deposit checks payable to him, entries of which were made in his pass-book, and to draw against such deposits such an indorsement in the absence of a different understanding is presumptive of more than a mere agency or authority to collect. The special purposes for which an

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indorsement for deposit is made under such circumstances may be readily inferred. It was a request and direction to the garnishees to deposit the sum to the credit of the defendant, and conferred on them not only authority to collect, but also authority to put the check in such form and use it in such manner as in their judgment and discretion having reference to the condition and necessities of their business, would make it most available to their protection. The effect of the indorsement for the consummation of this purpose is to vest the garnishees with the title to, and control of the check. If in such case the check is not paid, the banker depends for safety and indemnity on the liability of the drawer and the security of the indorsement.

4. Although a check does not call for acceptance, and the holder can present it only for payment, the certification of checks is a means in constant and extensive use in the business of banking and its effects and consequences are regulated by the law merchant. A certified check has a distinctive character as a species of commercial paper, and performs important functions in banking and commercial business. The certification constitutes a new and distinct contract between the holder and certifying bank, which becomes the debtor of and only liable to the holder. The funds of the drawer have in legal contemplation been withdrawn from his credit and appropriated to the payment of the check. He and the indorser, if any, are released from all further liability; as to them the check is paid.

In *Merchants' Bank v. State Bank*, 10 Wall. 604, it is said : "By the law merchant of this country, the certificate of a bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart to its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an understanding that the check is good then and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor or any other obligation it can assume. The object of certifying a check as regards both parties is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions, until in the course of business

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it goes back to the bank for redemption and is extinguished by payment.

In *Willets v. Phoenix Bank*, 2 Duer, 121, Chief Justice OAKLEY said: "When the business of the bank is properly conducted, it is the duty of the officer certifying the check to cause it to be immediately charged, as paid, in the account of the drawer, and when this is done, the sum thus charged will remain as a deposit in the bank, to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands upon exactly the same ground as every other." And STRONG, J., said: "Checks on a bank, marked 'good,' are to be regarded as evidence of deposit to the credit of the holder." *Girard Bank v. Bank of Penn Town.*, 39 Penn. St. 92. If the check is certified to be good, "in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him deposited to his own credit, and a certificate of deposit issued to him therefor." Dan. Neg. Inst., § 1603; *Morse Bank*, 307-315; *First Nat. Bank v. Leach*, 52 N. Y. 350; s. c., 11 Am. Rep. 708. When the check was certified, it ceased to possess the character, or to perform the functions, of a check, and represented so much money on deposit, payable to the holder on demand. The check became a basis of credit—an easy mode of passing money from hand to hand, and answered the purposes of money. The garnishees, by accepting a certification of the check, made it their own, and the relation of debtor and creditor was created between them and the defendant.

5. The rule that where a defendant has the election to sue for a tort committed, or to waive the tort and to sue for the money received by the *tort-feasor*, the relation of debtor and creditor does not exist until the defendant elects to sue for the money, and that his creditors cannot defeat his election by bringing process of garnishment, does not apply. The garnishees committed no wrong, or tort, of which the defendant can complain. They had a legal right to accept a certification of the check, and leave the money on deposit with the People's Savings Bank, instead of transferring it to their own vault. Certification of the check was within the authority vested in the garnishees by its deposit and indorsement, and is a mode authorized by the law, by which it could be made available to them. The defendant obtained his purpose—a deposit with the garnishees to the amount of the check, against which he

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was entitled to draw — not by the wrongful and unauthorized act of the garnishees, but in pursuance of his request, as evidenced by his deposit and indorsement of the check. It was not wrongfully taken from his possession, nor was it converted by the garnishees to their own use, other than for the purpose contemplated and intended by the parties. The defendant has no right of action against them, as for a tort, on account of the certification of the check. Its certification was a payment as between the defendant and the garnishees, and thereafter they were bound to pay his checks in money, and were answerable to him for money had and received.

The garnishment operated as a lien, from the time of service, on any money or effects of the debtor in the possession of the garnishee, and by no act of the debtor, or of the garnishee, or of both, can the lien be defeated. *Warfield v. Campbell*, 38 Ala. 527; *Dore v. Dawson*, 6 Ala. 712. While the check is, ordinarily, executory and revocable, and the drawer may countermand its payment, when the bank has certified the check, and thereby comes under obligation to the holder to pay it on presentment, the power to revoke ceases as effectually as if actual payment had been made. The drawer's authority over the funds on which it is drawn terminates *pro tanto*. The same effect is produced when the law, by proper legal process intervenes, and attaches or sequesters the fund. *Morse Bank*. 305. The notices by which the drawer forbade the garnishees to collect the check, and the defendant revoked their authority to present it for payment, having been given after the certification of the check, and after the service of the garnishment, were ineffectual to change the rights of the plaintiff, or to displace any lien acquired by the legal process.

By what we have said we have not intended to intimate any opinion as to the validity of the claim of Newgass & Co., or of Leinkauf. These questions have not yet arisen. All we decide is, that on the facts set out in the answer, if no adverse claim were interposed, the plaintiff is entitled to judgment against the garnishees; but it appearing there are adverse claimants, notices should be issued to them, under the statute, to propound their claims, and contest the plaintiff's right to the fund.

Reversed and remanded.

Lewis v. Coffee County.

LEWIS v. COFFEE COUNTY.

(77 Ala. 190.)

Water and water-courses — what is “navigable” stream.

A stream is not navigable upon which logs can be floated only during a freshet or at high water.*

ACTION on a bond. The opinion states the case. The plaintiff had judgment below.

N. W. Griffin and W. D. Roberts, for appellants.

Jno. D. Gardner and H. L. Martin, contra.

CLOPTON, J. By “An act to provide for the security and protection of the public bridges in the county of Coffee” (Acts 1882-3, 257), it is declared unlawful for any person to float any raft of timber or logs down any of the streams in the county of Coffee, where there are one or more public bridges, without having first filed a bond in the office of the judge of probate, approved by him, payable to the county, in a sum not less than five hundred, nor more than one thousand dollars, at the discretion of the judge of probate, and conditioned to pay all such damages as may result to any of the public bridges therein, in consequence of the floating of any timber or logs over any of the streams in the county where such bridge is located. The action is brought by the county, to recover damages for the breach of a bond given under the provisions of this act; and the defense insisted on is, that the stream across which the bridge is erected is a navigable water; that the statute is unconstitutional, and the bond is without a valid or legal consideration.

Pea river, the stream in question, is above tide-water, and *prima facie* private, not subject to the public right of floating or rafting timber or logs. Every definition of a navigable fresh-water stream must be necessarily general, modified to some extent by the peculiar conditions of its locality and the special wants of the inhabitants. In sections where the transportation of lumber is an important or controlling business, circumstances and the necessities

* See 43 Am. Rep. 277.

of trade have impressed the character of navigability, which fail in other conditions where no such pressing necessities exist, and there are other interests equally or more important to subserve. It may be said generally, any stream, though above tide-water, "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country, through which they flow, to market," is a navigable water; and by the act for the admission of Alabama into the Union, "shall forever remain public highways, free to the citizens of said State and of the United States." Said FIELD, J., in *The Daniel Ball*, 10 Wall. 557: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact, when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." And in *The Montello*, 20 Wall. 430, it is said: "It would be a narrow rule to hold, that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state, of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." As the result of the current of authorities, it may be conceded, that a stream of sufficient depth and width, in its natural state, to be used for the transportation of timber or logs, though it may not be technically navigable, is subject to the public right of user.

The question, what constitutes a navigable stream has been heretofore considered by this court, and the tests applicable have been determined. In *Ellis v. Carey*, 30 Ala. 725, it was held, that a creek not affected by the ebb and flow of the tide, which had never been declared a public highway by legislative authority, and was not treated as a navigable stream by the United States surveyors, is not a navigable stream, though during twenty years keel-boats, loaded with cotton, had been several times floated, and timber and lumber rafted down it during the winter season, but during the summer there was not sufficient water for these purposes. A distinguishing test, approved by the court, was whether a stream is

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“susceptible or not of use as a common passage by the public.” In *Rhodes v. Otis*, 33 Ala. 578, it was said: “In determining the character of a stream, inquiry should be made as to the following points: Whether it is fitted for valuable floatage; whether the public, or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors, or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage. And in the application of these inquiries to the facts of a case, it is to be remembered that the *onus probandi* is upon the party claiming that a stream above tide-water is public.” These tests were cited with approval in *Peters v. N. O., Mo. & Chatt. R. Co.*, 56 Ala. 528.

We do not understand, that to constitute a navigable stream it is requisite there shall be sufficient water for the common uses of trade and commerce during all seasons of the year. It must however, as the results of natural causes, be capable of valuable floatage periodically during the year, and so continue long enough at each period to make it susceptible of beneficial use to the public. Says Cooley: “If a stream is of sufficient capacity for the floating of rafts and logs in the condition in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too dry and shallow for the purpose.

* * * A brook, although it may carry down saw-logs for a few days, during a freshet, is not therefore a public highway.” In general, a stream, to be navigable in its legal meaning, must be of such character, as to be of actual or practical utility to the public as a channel of trade or commerce. *Hickok v. Hine*, 23 Ohio St. 523; s. c., 13 Am. Rep. 255; *Hubbard v. Bell*, 54 Ill. 110; *Wethersfield v. Humphrey*, 20 Conn. 218; *Neaderhauser v. State*, 28 Ind. 257; *Barclay R. & C. Co. v. Ingham*, 36 Penn. St. 194; *Rowe v. Granite Br. Co.*, 21 Pick. 344; *Morgan v. King*, 35 N. Y. 459; *Thunder Boom Co. v. Speechley*, 31 Mich. 336.

The only evidence respecting the navigability of the stream, shown by the record, is, that it “was a stream upon which logs could be floated only at high water, or during a freshet, by the

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public generally, to Pensacola, Florida, where it was generally marketed." There is no inquiry, whether it is suitable for valuable floatage or rafting; to what extent the public are interested in transportation; what public interests are involved; whether the stream had been previously used, and how long, or what length of time the capacity for floatage or rafting continued. On the facts shown by the record, Pea river is not a navigable stream at the place where the bridge is erected.

This conclusion renders unnecessary a consideration of the other questions presented in the argument of counsel.

Judgment affirmed.

 FIRE INSURANCE COMPANIES V. FELRATH.

(77 Ala. 194).

Insurance — fire — loss payable to mortgagee.

Where a fire insurance policy is taken by a mortgagor in his own name, conditioned that the loss shall be payable to the mortgagee, to the extent of his interest, the mortgagee may not maintain an action on the policy although the loss does not exceed the amount due on his mortgage.*

ACTION on fire insurance policies. The opinion states the point. The plaintiff had judgment below.

Overall & Bestor. for appellants.

Toulernier, Taylor & Prince, contra.

STONE, C. J. Can Felrath maintain these actions in his own name? We think not for the following reasons: The policies were taken out in the name and in favor of James Clark, who owned the property. The gross sum of the policies was \$1,550. Felrath had a mortgage on the property, but the policies were neither assigned nor transferred to him so as to constitute them his property, nor to make him, Felrath, the party assured. The only interest Felrath had is shown on the face of the policies themselves and is expressed in this language: "Loss if any payable to Joseph Felrath, to the extent of his mortgage." It is not stated what was

* See *Coates v. Penn. Fire Ins. Co.* (58 Md. 172), 42 Am. Rep. 827.

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the extent of his mortgage interest. It is shown in the proof that it was about two-thirds of the sum assured. The policies all bear the same date, expire at the same time and were procured through the same resident agent. In case of loss each company was bound to contribute *pro rata* to the extent of the sum insured. This constitutes these several policies substantially one transaction — one contract — so far as Felrath's right to sue is concerned. Possibly we might go further and hold from the known usage in such cases, that Clark applied to the agent for insurance to the extent of \$1,550, and that the risk was parceled out among several companies, in order that the burden might be apportioned in case of loss. But this is not necessary. It is enough that the liability of all the companies was \$1,550, and there is neither facts nor presumption that any one of these liabilities was incurred before the others were.

We have then a binding contract or contracts, by which these companies bound themselves to pay to Clark, on a certain contingency, \$1,550, with a direction and agreement in case of loss to pay \$1,080 of the sum to Felrath. To whom according to the terms of the contract was the remaining sum of \$470 to be paid? Evidently to Clark, the holder of the policies. This was the *status* of the contract at the time the negotiations terminated in a final agreement. This was not an assignment of the policies nor either of them but a mere appointment of a part of the money to be realized upon them. *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Flanders Fire Ins.* 441; *Hale v. Mech. Mut. Fire Ins. Co.*, 6 Gray, 169; *Loring v. Manuf. Ins. Co.*, 8 Gray, 28; *Fogg v. Mid. Mut. Fire Ins. Co.*, 10 Cush. 337; *Bidwell v. North Western Ins. Co.*, 19 N. Y. 179; *New Eng. Mar. Ins. Co. v. Wetmore*, 3 Ill. 221; *Ill. Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Ill. Mut. Fire Ins. Co. v. Fix*, 53 Ill. 151; *Blanchard v. Atl. Mut. Fire Ins. Co.*, 33 N. H. 9; *Nevins v. R. Mut. Fire Ins. Co.*, 25 N. H. 22; *Folsom v. B. Co. Mut. Fire Ins. Co.*, 30 N. H. 231; *Home Mut. Ins. Co. v. Hauslein*, 60 Ill. 521; *Franklin Sav. Institution v. Central Mut. Fire Ins. Co.*, 119 Mass. 240.

It is contended for appellee that Felrath can maintain this action under section 2890 of the Code of 1876, which provides that actions on contracts express or implied for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not. This would undoubtedly be the case if by the terms of the policy or assignment pursuant to its terms,

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the entire sum of the insurance money had been payable to Felrath. *Appleton Iron Co. v. Br. Amer. Assur. Co.*, 46 Wis. 23; *Keeler v. Niagara Falls Fire Ins. Co.*, 16 Wis. 523. We hold however that the right of action on this contract must be determined by the *status* of the transaction which the parties by their contract have fixed upon it. It is the contract itself and not any after occurring accident which determines the intention the parties had. They appointed the payment of a part of the money to Felrath in case of loss. They did not appoint the payment of the entire sum nor were the policies assigned. They did not confer on Felrath a right to sue for a part and on Clark the right to sue for the residue. That would have been to split one contract into two causes of action which can only be done by agreement of debtor and creditor having that object in view. It was not done in this case; and the accident that the loss was only partial, and did not exceed the sum appointed to be paid to Felrath, can neither change the contract relations of the parties nor affect an assignment of the policies. There are a few cases which it is contended hold the contrary of these views, but if they do we decline to follow them. *N. W. Mut. Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446; *Hammel v. Queen Ins. Co.*, 50 Wis. 240; s. c., 41 Am. Rep. 1; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564. In some of these cases the appointee's claim equalled or exceeded the whole sum insured, which of course involved no splitting up of the cause of action. This distinguishes such cases from this. *Watertown Fire Ins. Co. v. Sewing Machine Co.*, 41 Mich. 131.

[Other points omitted.]

Reversed and remanded.

MONTGOMERY SOUTHERN RAILWAY COMPANY V. MATTHEWS.

(77 Ala. 357.)

Fraud — in procuring subscription to railway stock.

False representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route, as to the intended location, and the time within which it will be completed to a particular place, are not fraudulent, nor available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive.

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ACTION on subscription to railroad stock. The opinion states the point. The defendant had judgment below.

Jno. D. Gardner and Sayre & Graves, for appellant.

John Gamble, contra.

STONE, C. J. In *Rives v. Montgomery South Plank-road Co.*, 80 Ala. 92, the suit was on a subscription to the capital-stock of the plank-road company. The defense was fraud in procuring the subscription. On the trial, "the defendant offered to prove, that before he subscribed for any stock in said company, and before its organization under its charter, two of its subscribers for stock, one of whom was afterward elected president, and the other secretary of the corporation, represented to him that the road would be so located as to pass through his plantation, thereby greatly enhancing the value of his lands; that these representations were repeated by them after their election to their respective offices, and thereupon defendant subscribed for five shares of the capital stock of said company, and that said road, as afterward located, did not pass within five miles of defendant's plantation." This testimony was rejected by the court, on plaintiff's motion, and the propriety of that ruling was the sole question presented in this court. In passing on that question, the majority of this court said: "We cannot doubt that the declarations of those officers, as offered by the defendant, were relevant and admissible. Those declarations certainly throw some light upon one of the material questions in the case, and to exclude them is to deny, practically, to the defendant the right to prove the very basis on which he rests his defense. Until these declarations are proved, it is impossible to show that they were false, or that they formed an inducement to the defendant to subscribe." It will be observed that in the case above, we did not decide that the representation, even if not kept and conformed to as a promise, was in itself sufficient to avoid the subscription. That question was not before us. We simply held that it was legal evidence — a predicate for further testimony.

An opinion expressed, even if not realized, cannot, without more, become a fraudulent representation. 2 Brick. Dig. 14, §§ 16, 21; *Lake v. Security Loan Asso.*, 72 Ala. 207. If however such opinion is falsely expressed, with intent to deceive, and does deceive, this

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constitutes such opinion or representation a false statement of fact, and vitiates a contract thereby procured, unless the representation relates to a matter equally open to both parties. This could not deceive.

In *Pierce on Railroads*, 61, it is said: "This defense (fraud in procuring a subscription) is usually founded in statements known to be false by its official managers, and made by them, or by agents in their behalf, concerning the financial condition and earnings of the company, the amount subscribed, or other material facts calculated to tempt subscribers. They may be made by officers and agents directly to subscribers or through a prospectus issued by the company to the public, for the purpose of obtaining subscriptions. * * * Equity will set aside a subscription when procured by fraud." And on page 62 it is said: "The subscriber cannot defend on the ground of fraud, * * * where it declared only opinions instead of facts, or where it declared facts of which the subscriber had means of knowledge." The same doctrine is expressed in *Morawetz Corp.*, § 309, and in 1 *Redf. Railw.* (5th ed.) 172, 3. See also 14 *Am. Law Review*, 192-3; *Franklin Glass Co. v. Alexander*, 9 *Am. Dec.* 92, note, 102; *Miss., Ouachita & Red River R. Co. v. Cross*, 20 *Ark.* 443; *Evansville, Ind. & Cl. S. L. R. Co. v. Posey*, 12 *Ind.* 363; *Smith v. R. River Co.*, 2 *L. R. Eq. Cas.* 262; *Water Valley Man. Co. v. Seaman*, 53 *Miss.* 655; *Hanover Junction R. Co. v. Haldman*, 82 *Penn. St.* 36; *Crump v. U. S. Min. Co.*, 7 *Gratt.* 352.

In Pennsylvania, the rule that parol testimony cannot be received to vary the terms of a written contract does not prevail; and hence in that State the rulings are somewhat different. *Caley v. Phil. & Chester Co. R. Co.*, 80 *Penn. St.* 363; *Kostenbader v. Peters*, 80 *Penn. St.* 438; *Lippincott v. Whitman*, 83 *Penn. St.* 244. That rule does not prevail with us. *Henderson v. R. Co.*, 17 *Tex.* 560, is perhaps the strongest authority that can be found in favor of appellee's views. We are not inclined to go so far.

There can be no question, that if the stock subscription in this case was procured by the fraud of Kirkpatrick, the soliciting agent, the railroad corporation claiming the benefit of the subscription, must take it tainted with Kirkpatrick's fraud. *Story Agency*, § 253; *Corning v. Southland*, 3 *Hill (N. Y.)*, 552; *Mead v. Bunn*, 32 *N. Y.* 275; *Harris v. Delamur*, 3 *Ired. Eq.* 219; *Meadows v. Smith*, 7 *Ired. Eq.* 7.

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There are cases of fraud, and other unlawful acts, particularly when acts of the same general character are continuous in their nature, where it is permissible to prove other similar transactions occurring about the same time, as shedding some light on the transaction in controversy. *Bigelow Fraud*, 478; *Benham v. Carey*, 11 Wend. 83; *Aldrich v. Warren*, 16 Me. 465; *Lovell v. Briggs*, 2 N. H. 218; *Whittier v. Varney*, 10 N. H. 291; *Blodgett v. Morrill*, 20 Vt. 509. The present case does not fall within this rule.

There is another class of cases, where a statement is made as of fact, and relying on its truth, a purchase is made on the strength of it, but it turns out to be untrue. Now if the erroneous statement was as to a matter of substance, and operated as an inducement to the purchase, then it furnishes ground for defending against the purchase, even though the seller honestly believed the facts existed as he represented them to be. This principle rests, not on the doctrine of fraud, but on the ground that the purchaser failed to get what he bargained for, and failed because of the erroneous statement of fact made by the vendor, which he trusted, and had a right to trust. *Munroe v. Pritchett*, 16 Ala. 785, and to some extent, *Atwood v. Wright*, 29 Ala. 346, illustrate this principle. It cannot apply however where the representation consists in opinion. That, to be the basis of a legal right, in any case, must be knowingly false, and uttered with intent to deceive. A positive statement, made in the sale of a tract of land, that the line runs at a designated place, if acted on, and turns out to be untrue, misleads the purchaser. If the lands obtained are less valuable than the lands pointed out, he is deceived, and consequently is armed with an appropriate remedy to secure his indemnification. If however the representation be made as matter of opinion only, then to obtain any relief, the purchaser must show that the representation was made knowing its falsehood. Less than an intentional deception, in such conditions, gives no right of action.

One of the grounds of demurrer to all the special pleas is, "that the representations set up as a bar to plaintiff's right to recover were mere matters of opinion of said agent." There are many other grounds, questioning the sufficiency of the pleas in almost every particular. The representations set forth in each of the special pleas relate to matters afterward to be performed, and could be nothing but opinion. These pleas are fatally bad, because

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they do not aver that Kirkpatrick did not honestly entertain the opinions he expressed, and the proof on this question is no better than the pleading. The demurrers to the special pleas ought to have been sustained.

Under the principles declared above, many rulings of the court in admitting testimony, and in charges given, were erroneous. We will not particularize, believing as we do, that what is stated above will furnish a sufficient guide on another trial.

There is a possible phase of this case not covered by what is said above, nor sufficiently averred in the pleadings. Kirkpatrick testified, that he was authorized by the directors to agree with the subscribers to stock living in Crenshaw county, that their money should be refunded to them, if the railroad was not built to a point at or near Rutledge. He did not in terms say he gave such promise. He also testified, that the money was exhausted, and work on the road had progressed only to "Bell's Store," and had long been discontinued. The record fails to show what is the present *status* of the corporation, whether or not it is insolvent, or in active existence, and whether or not it has the means of carrying the road to Rutledge. If the corporation is bankrupt, or has no means of ever constructing the road to Rutledge, it would seem to be a bootless performance to force the Crenshaw stockholders to pay their subscriptions, to be immediately refunded to them; and if the corporation be insolvent, without power or purpose to complete the road to Rutledge, perhaps it may be defeated and restrained in its attempt to coerce collections, at an expense that might be appalling. We merely throw out these suggestions in the interest of justice and economy. The law takes no pleasure in useless litigation.

Reversed and remanded.

Grider v. Tally.

GRIDER v. TALLY.

(77 Ala. 428)

Office and officer—judge—liability of, for refusing license.

In granting or refusing a license to retail spirituous liquors a probate judge acts ministerially, and an action lies on his official bond if he improperly refuses a license.

ACTION on bond of probate judge. The opinion states the case. The defendant had judgment below.

D. D. Shelby, for appellant.

Robinson & Brown, contra.

CLOPTON, J. It is an unquestioned rule founded on the public benefit, the necessity of maintaining the independence of the judiciary, and its untrammelled action in the administration of justice that a judge cannot be held to answer in a civil suit for doing or omitting or refusing to do an official act in the exercise of judicial power. His responsibility for the manner in which he discharges the high trusts committed to him is the sovereignty from whom he derives his authority. It is also an undisputed rule that an officer who is charged with the performance of ministerial duties is amenable to the law for his conduct and is liable to any party specially injured by his acts of misfeasance or non-feasance. When the law assigns to a judicial officer the performance of ministerial acts, he is as responsible for the manner in which he performs them or for neglecting or refusing to perform them as if no judicial functions were intrusted to him. The boundary of his judicial character is the line that marks and defines his exemption from civil liability.

Our law, organic and statutory, confers on the probate judge large judicial powers, and there is also assigned to him the performance of many acts merely ministerial; he is both a judicial and a ministerial officer. In *Thompson v. Holt*, 52 Ala. 491, it is observed: "A bond was by legislation demanded from him as a guaranty for diligence and fidelity in the performance of his ministerial duties, as it is exacted from other mere ministerial officers. It is not a

guaranty for his integrity and fidelity as a judge. For this no other security is demanded from him than that demanded from all other judicial officers --- his official oath, and the sense and responsibility which the power and dignity of the office inspire. The official bond stands as an indemnity against his errors, or his willful misconduct, as a ministerial officer only. * * * For that which he may do or omit as a judge, he is exempt from civil suit or indictment. The policy of the State, founded on a due regard for the interests of the community, expressed in legislation which began in the days of our territorial existence, and which has been enlarged as public necessity demanded, has required of a probate judge an official bond, with sufficient sureties, conditioned in legal effect for the faithful performance of his ministerial duties, as a condition precedent to his induction into the office."

The official bond being a guaranty and conditioned for the faithful discharge of duties ministerial in their character, the inquiry addressed to our consideration is, whether the probate judge, in the matter of refusing to issue a license to the plaintiff, acted in a judicial or ministerial capacity.

Judicial power is authority vested in some court, officer or person, to hear and determine when the rights of persons or property, or the propriety of doing an act are the subject-matter of adjudication. Official action, the result of judgment or discretion, is a judicial act. The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from designated facts, is a ministerial act. *Flourney v. City of Jefferson*, 17 Ind. 169; *Tenn. & Coosa R. Co. v. Moore*, 37 Ala. 371; *Morton v. Comp. Gen.*, 4 S. C. 430; *Commissioner v. Smith*, 5 Tex. 471; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291. The inquiry should be directed to the question, does discretionary power attach to the office, the authority to decide, whether the license should or should not be granted?

Section 1544 of the Code provides: "No license must be granted to sell vinous or spirituous liquor, unless the applicant produce to the judge of probate of his county, or to the person authorized by law to grant such license, the recommendation of ten respectable freeholders and householders thereof, residing within four miles of such applicant, stating that they are acquainted with him, that he

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is possessed of good moral character, and is in all respects a proper person to be licensed." The succeeding section prescribes the oath, which the applicant must take and subscribe before license is granted; which oath may be administered by any officer authorized to administer oaths; and section 491 makes it the duty of the probate judge to issue the license upon payment of the amount required by law to be paid. Blank licenses are furnished by the auditor, to be filled and signed by the probate judge. No power is conferred on the probate judge to pass on the moral character of the applicant, or whether he is a proper person to be licensed, or on the propriety of issuing a license. He adjudges nothing—decides no question. On the production of the proper recommendation, taking and subscribing the prescribed oath, and paying the requisite amount, it is the clear and specific duty of the probate judge to issue the license.

If it be said, that the probate judge has to ascertain that the recommendation is by the freeholders and householders of the county, residing within five miles of the applicant, a similar necessity exists in every case of a ministerial duty. A sheriff must determine whether process, coming into his hands, is issued from a court of competent jurisdiction, and is regular on its face; and a treasurer of public moneys must ascertain whether the warrant is drawn by such officer, and in such manner that its payment is a duty; but the execution of the process, and the payment of the warrant, are ministerial acts. A judge must determine whether a judgment is entered according to the verdict of the jury, or the consideration of the court, and whether a bill of exceptions correctly recites the proceedings; but the act of signing the judgment and bill of exceptions is ministerial. That a necessity may exist for the ascertainment, from personal knowledge, or by information derived from other sources, of the state of facts on which the performance of the act becomes a clear and specific duty, does not operate to convert it into an act judicial in its nature. Such is not the judgment, or discretion, which is an essential element of judicial action. *Crane v. Camp*, 12 Conn. 464. If the probate judge acts judicially in the matter of issuing a license, his decision is final and conclusive, and a license issued to a relative, within the degrees that disqualify a judge, is void. *Halso v. Seawright*, 65 Ala. 431.

An appropriate and general test is laid down in *Rains v. Simpson*, 50 Tex. 495; s. c., 32 Am. Rep. 609, as follows: "Perhaps as safe a criterion as any other, to ascertain whether a private suit will or will

not lie, is to adopt the rule which governs in cases in which a *mandamus* would or would not be granted." On the refusal of the probate judge to issue the license, when first applied for, the plaintiff made application to the Circuit Court for a *mandamus*, commanding him to issue it. A peremptory *mandamus* was granted by the Circuit Court, and on appeal to this court, the judgment was affirmed. *Tally v. Grider*, 66 Ala. 119. The character of the specific act asked to have performed was necessarily involved in the issue, and determined. This is manifest, when it is observed that a *mandamus*, issued to an officer in a matter in respect to which he has discretionary powers, requires him only to take action, without directing the manner in which his discretion shall be exercised; but when the act is merely ministerial, and its performance mandatory, the officer having no discretion, the *mandamus* requires and commands the doing of the specific act. If the duty of the probate judge is judicial—if he possesses discretionary power to issue or not a license—a *mandamus* would not, and could not have been granted. The probate judge having already taken action and refused, a *mandamus* would have had no office to perform. Awarding a peremptory *mandamus* is a judicial ascertainment that the probate judge has no discretionary powers.

It may be proper to observe, that our consideration has been directed to the nature of the power and duty of the probate judge under the general laws providing for and regulating the issue of license to sell vinous or spirituous liquor. While we judicially know the act, commonly called the "Local Option Law," passed in 1875, and that it is applicable to Jackson county, on demurrer to the bill of complaint, which does not aver, nor make any allusion to any proceedings under the act, we cannot take judicial notice that an election has been ordered and held as provided, or of its result. An expression of opinion, on the assumption that an election has been ordered, and held with a prohibitory result, would be premature, and mere *dictum*.

Reversed and remanded.

East Tennessee, Virginia and Georgia Railroad Company v. Bayliss.

**EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY
V. BAYLISS.**

(77 Ala. 430.)

Railroads — statute — “on the track.”

A statute makes it the duty of railway locomotive engineers, “on perceiving any obstruction on the track of the road,” to use all means to stop the train. *Held*, that this does not apply to an animal running by the side of the track and suddenly springing on the track too late to be avoided.

ACTION for killing a horse. The opinion states the point. The plaintiff had judgment below.

Humes, Gordon & Sheffey, for appellant.

W. P. Chitwood, and *J. C. Kump*, contra.

CLOPTON, J. The general assembly, deeming the common-law rules insufficient for the ample protection of persons, stock, and other property, enacted statutes regulating and defining in certain cases the duties and liabilities of railroad companies. These statutes have been repeatedly examined and considered, and their construction may be regarded as well settled. Section 1699 of Code, after making it the duty of the engineer to give specified signals, on approaching, passing, and leaving designated places, provides: “He must also, on perceiving any obstruction on the track of the road, use all means known to skillful engineers (such as the application of his brakes, and the reversal of his engine), in order to stop the train.” The succeeding section (1700) makes the company liable for all damages to persons, stock or other property, resulting from a failure to comply with the requirements of section 1699, and when any stock is killed or injured, or other property damaged or destroyed by the locomotive or cars, the burden of proof is on the company to show that the requirements of the statute were complied with.

The statute is a modification of the common law. The absolute duty to use all means to stop the train, on perceiving an obstruction on the track, did not exist independent of the statute. It might or it might not be a duty, according to the circumstances.

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In some conditions, safety consists in quickening the speed. The statute ought not to be extended by construction to cases not included in its clear and unambiguous terms, especially as a failure to comply with the requirements of the statute is made a misdemeanor. To originate the statutory duty, there must concur an obstruction on the track of the road, against which the locomotive or train may strike while running its proper course and direction, and it must be perceived by the engineer. An animal, though near the road, and on the company's right of way, is not an obstruction on the track of the road, within the meaning of the statute. *L. & N. R. Co. v. Reidmond*, 11 Tenn. 205. When it is sought to hold the company liable for damages resulting from a failure to comply with the requirements of the statute, the inquiry should be directed to the ascertainment of the fact, on the existence of which the statutory duty arises. To establish it, positive proof is not essential. Like any other fact to be judicially ascertained, circumstances from which the inference may be reasonably and satisfactorily drawn, convincing to the mind, will be sufficient. When the fact exists, it is the duty of the engineer to use all means known to skillful engineers, to stop the train, and when it is established on the trial, the burden is on the company to show a compliance with the requirements of the statute. The law however does not exact an attempt of the impossible. If an animal suddenly springs on the track, in front of, and so near to the engine, that no human appliances could avail to avoid the injury, the engineer does not violate his statutory duty in not making the attempt to stop the train. See this case at the last term, 74 Ala. 150, and 75 Ala. 466.

This construction of the statute does not relieve the company of all liability, when the obstruction is not on the track of the road. When an animal is off the track, and is discovered in close proximity, under circumstances indicating danger, the duty and liability of the company are governed by the rules of the common law. *S. & N. Ala. R. Co. v. Jones*, 56 Ala. 506. The employees are required to use the care and diligence which a careful and prudent person, handling agencies of similar hazard and power, would employ in the management of his own business. All reasonable care and diligence should be observed, to prevent danger or injury. If a horse is seen on the side of the road, or running along its line, while the train is in motion, proper means should be used to frighten him away, and if the road is fenced on both sides, the horse running between the

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fence and the road, and the first opening is on the opposite side, the expectation that he would attempt to cross at the first opening is natural, and under such circumstances, it is the duty of the engineer to adopt means to check the speed of the train, that the horse may safely pass, unless checking involves more peril than continued running.

We have stated the rule governing the liability of the company, on the hypothesis that the animal is seen. Actual discovery is not essential. The obligatory care and diligence consist both in a proper watchfulness, and in the use of the appropriate and necessary means to prevent an accident, when the danger is discovered. When the animal is not seen because of the inattention or negligence of the engineer, and injury results by reason thereof, the company is liable, as if the animal had been observed. A proper lookout at all times, along the track, and near the road, is a duty enjoined by law. An engineer has other equally important duties in operating a train, which demand portions of his time and attention. It is not meant, "that the engineer shall keep his eye steadily on the track before him, to the neglect of his other equally imperative duties. * * * He meets this requirement, when he bestows on the service that steady, regular care and watchfulness which his other duties allow a very careful and prudent person to give to it." See this case, *supra*.

Negligence *vel non*, in such case, depends upon the attendant circumstances. The inquiry to which the investigation should be directed, is whether the engineer, by keeping a proper lookout, consistent with the discharge of his other duties, could have discovered the animal in time to prevent the injury by the employment of due precautions. In this case, if on the foregoing rules the engineer could have discovered the horse in time to have checked the speed of the train, so as to have allowed him to escape, the company is guilty of negligence. On the other hand, if the engineer was in the discharge of his duties, and was using that degree of diligence which very prudent persons observe in the conduct of their own business, and did not discover the horse, until it sprang on the track in front of, and in such proximity to the engine, that no human agencies could have avoided the injury, the company is not liable. The question is, not whether the engineer could have possibly discovered the horse, but whether there was a reasonable capability of seeing him under all the circumstances. 74 Ala. 150.

[Other matters omitted.]

Reversed and remanded.

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MONTGOMERY AND EUFAULA RAILWAY COMPANY V. THOMPSON.

(77 Ala. 443.)

Railroad — negligence — dangerous station grounds — leases — contributory negligence.

The A. and B. railroad companies owned a railway station and grounds in the city of Montgomery, and leased it to the defendant railroad company. The plaintiff came to Montgomery on the defendant railroad, and on alighting at the station, desiring to find a privy, made inquiry of a stranger, who pointed in the direction of a privy erected on the bank of the river, at the further end of the platform, about fifty yards from the station; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff, and sustained serious injuries. The railroad platform was well lighted, and extended from the depot to the river; but there was no light at the privy, and a house intervened between it and the lights on the platform. The plaintiff was acquainted with the locality. *Held*, that he had no cause of action against the A. & B. railroad companies, as to them being a mere stranger; and that he could not recover against the defendant, because being acquainted with the locality, he was guilty of contributory negligence in attempting to find the privy without further inquiry.

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

Thomas G. Jones, J. M. Faulkner, and Arrington & Graham,
for defendants.

Troy & Tompkins, contra.

STONE, C. J. [Minor points omitted.] The depot-building and depot-yard, or grounds annexed, known as the "Union Depot" in Montgomery, are the property of the South and North Alabama and the Louisville and Nashville Railroad Companies. The Montgomery and Eufaula Railroad Company has no interest in the property. It has purchased the common use of said depot property, to the extent that its trains come on the depot-yard for the purpose of receiving and discharging its passengers and their baggage, and receiving and delivering the mails; and it has also the common use of the waiting-rooms, and the ticket and baggage offices, to the extent they are necessary for the successful running of its passenger trains. For this use it pays a stipulated

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rent. Thus using the depot, we do not hesitate to declare that the M. & E. Railway Company rests under the same duties to the public, in relation thereto, as if it owned the property in fee.

There is a common duty resting on all persons, artificial as well as natural, who own real estate on which the public is expressly or impliedly invited to enter, that it shall be kept free from traps and pitfalls; and if this duty be neglected, and injury result therefrom to any person, the person suffering by such trap or pitfall may recover damages for the injury. This is a general rule of society, crystallized into law. It partakes of the nature of a public nuisance done or suffered, which inflicts special injury on an individual. To a suit for such injury, it is no defense that the injury was not intended. Human conduct must be tested by its known general, or ordinary consequences. *Alger v. City of Lowell*, 3 Allen, 402; *McKone v. Mich. Cent. R. Co.*, 51 Mich. 601; s. c., 47 Am. Rep. 596; *John v. Bacon*, L. R., 5 C. P. 437; *Indermaur v. Dames*, L. R., 2 C. P. 311; *Smith v. London & St. K. Dock Co.*, L. R., 3 C. P. 326; *McDonald v. Chi. & N. W. R. Co.*, 26 Iowa, 124; s. c., 29 Iowa, 170; *Knight v. P. S. & P. R. Co.*, 56 Me. 234; *Bennett v. L. & N. R. Co.*, 102 U. S. 577; 1 Am. & Eng. R. R. Cas. 71, and note; *Gillis v. Penn. R. Co.*, 59 Penn. St. 129; *Beard v. O. & P. R. R. Co.*, 48 Vt. 101.

The foregoing rule however does not apply to places strictly private, or where persons are neither expected, nor expressly or impliedly invited to go. *Howland v. Vincent*, 10 Metc. 371; *Kohn v. Lovett*, 44 Ga. 251; *Knight v. Abert*, 6 Penn. St. 473; *Ind. Cent. Ry. Co. v. Hudelson*, 13 Ind. 325.

All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property on which no one is invited, or can claim the right to enter, save those who have business with the railroad. Under this classification however we must include attending friends and protectors, who accompany friends to the train, to aid them in getting on, in procuring tickets, and in checking baggage, and kindred services. The same license is accorded to protecting friends, when the traveller is to leave the train. To persons filling these classes, the railroad corporation owe special obligations of duty, different from those due to the general public. While the former come by invitation, express or implied, the latter are mere pleasure-seekers, or are prompted by curiosity. For the use and comfort of the former class, railway companies are bound to keep in safe condition all portions of their platforms and

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approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go. Within these boundaries, a defect of structure which is likely to, and does cause injury, or any other trap or pitfall producing a like result, will fasten a liability on the railroad owing the duty. Of similar obligation to this primary class is the duty to provide safe waiting-rooms, and to keep the depot and platform well lighted in the night-time. 1 Thomp. Neg. 313, 314, 315; *Stewart v. I. & G. N. R. Co.*, 53 Tex. 289; *St. L., I. M. & S. R. Co. v. Cantrell*, 37 Ark. 519; *Coleman v. East. Counties Ry. Co.*, 4 Hurl. & Nor. 781; *Gillis v. Penn. R. Co.*, 59 Penn. St. 129; *McKone v. Mich. Cent. R. Co.*, 51 Mich. 601; s. c., 47 Am. Rep. 596; *Seymour v. C. B. & Q. Ry. Co.*, 3 Biss. 43.

The rule of obligation is essentially different, when the asserted rights of mere idlers, or sight-seers, are presented. To such the corporation owes nothing, beyond the observance of the duties of good neighborhood. Among these may be prominently classed the universal duty of doing no willful or wanton injury, and of erecting or continuing on or near its platform or approaches, to which the public may be expected to go, no nuisance, trap or pitfall from which personal injury is likely to ensue. 1 Thomp. Neg. 313, 314; *B. & O. R. Co. v. Schwindling*, 101 Penn. St. 258; s. c., 47 Am. Rep. 106; *Frost v. Gr. Tr. R. Co.*, 10 Allen, 387; *Morrissey v. East. R. Co.*, 126 Mass. 377; s. c., 30 Am. Rep. 686; *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525; *Sutton v. N. Y. Cent. & H. R. R. Co.*, 66 N. Y. 243; *Gillis v. Penn. R. Co.*, 59 Penn. St. 129; *P., Ft. W. & Chic. Ry. Co. v. Bingham*, 29 Ohio St. 364.

There is another important principle, which may exert some influence in this case. If one who complains of an injury suffered at the hands of another, has, through intention, recklessness, or carelessness, that is, want of ordinary care or attention, contributed proximately to the injury he complains of, this is a full answer to any right he could otherwise maintain on account thereof. *Memphis & Charleston R. Co. v. Copeland*, 61 Ala. 376; Sh. & Redf. Neg. 323; *Forsyth v. B. & A. R. Co.*, 103 Mass. 510; *Seymour v. Chic., O. & Q. Ry. Co.*, 3 Biss. 43; *Frost v. Gr. Tr. R. Co.*, 10 Allen, 387. In the case of *Forsyth v. B. & A. R. Co.*, *supra*, it appeared that the plaintiff, a passenger, alighted from defendant's

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cars at night, at a station, on one of two platforms extending along each side of the track to a highway (which as the plaintiff knew crossed the railroad), and having a step at the end next the highway, and that instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and in stepping off, he fell into a cattle-guard which had been dug across the track, and was injured; that the night being very dark, he felt with his feet to find the edge of the platform, but did nothing to ascertain what would be found on stepping from the platform. *Held*, that he was not in the exercise of due care, and could not recover.

The proof in this case shows the following facts, upon which there is no controversy: The Union (passenger) depot is at the foot of Commerce street, and is approached alone from that street. The end of its platform rests on Commerce street about one hundred feet, pointing up the river, and it extends back down the river, about two hundred feet. On the side of the platform farthest from the depot runs the Alabama river, with a precipitous bluff bank. The ticket-office, waiting and baggage-rooms are on the side farthest from the river, and the platform is kept well lighted, in the nighttime. No complaint is urged that the platform and its approaches were not in good order and well lighted. The plaintiff was acquainted with the locality. The track on which the Montgomery & Eufaula Railway Company received and discharged its passengers was nearest the depot-building, and the farthest from the river. The plaintiff came in on the M. & E. railroad train, after night-fall, and left the train at the depot, without injury or complaint. As we have said, there was no controversy up to this point. The testimony of the plaintiff, not contradicted, is, that soon after leaving the train he had occasion to seek a retired spot, and inquired of a person, whom he did not know, if he knew where there was a privy. He made no other inquiry. The person inquired of pointed in a direction diagonally across the platform, toward the river side of the lower end of the platform, and told him there was one there. He went in search of it, missed the place, wandered into the dark beyond and below the platform as much as fifty feet or more, and fell over the bluff, suffering very serious injury by the fall. This is the *gravamen* of the present suit. There is proof that there was a privy in the direction indicated, but it was without a light, and was hidden from the light of the platform by an intervening house.

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It is manifest, if there is any fault any where growing out of these facts, it is a mere non-feasance, without any of the elements which constitute a trap or pitfall. This, in a proper case, will fix a liability on the railroad, whose passenger is thus injured. It can extend no farther. No other railroad company owed the plaintiff any active duty, and hence could commit no tort in failing to do what it was under no obligation to do. There is no ground of recovery against either the South and North Alabama Railroad Company, or the Louisville and Nashville Railroad Company. As to them, plaintiff was a mere stranger or intruder.

It is contended for appellee, that it was the duty of the Montgomery and Eufaula Railway Company, whose passenger he was, to provide such accommodations for its customers; and the fact that none such was visible, lighted or could be found, renders that road liable for the injury suffered in searching for it. It may be that in cities and towns, such provision should be made for the travelling public, getting on and off trains. Such retreats however are not usually placed in public places, or lighted, except within inclosures, such as public hotels, cars, etc. Too great publicity would stamp them somewhat with the character of a nuisance. It is now made the duty of railroad companies to provide such accommodations, whenever thereto required by order of the railroad commission. Act approved February 23d, 1883. Sess. Acts, 154. This statute was enacted after the occurrence of the injury complained of in this suit, and may be treated as a legislative intimation that theretofore the duty was at least doubtful. Counsel have made diligent search for authorities bearing directly on this question and have found none. Their very careful and able briefs prove this. We ourselves have found no unerring guide for our pathway. We are therefore led to infer the present case is one of first impression. *Toomey v. London, B. & S. C. Co.*, 3 Com. B. 146, and *McKone v. Mich. Cent. R. Co.*, 51 Mich. 601, s. c., 47 Am. Rep. 596, come nearest to the question, of any cases shown to us; but each of these cases went off on the doctrine of traps and pitfalls on grounds adjacent to the depot, where passengers would be likely to go. A remark, in the case of *Toomey, supra*, by Sir EDWARD VAUGHAN WILLIAMS, one of the justices, leading author of the great work on Executors and Administrators, shows that in England, as well as in this country, juries need to be cautioned, when charged with inquiry of damages against railroads, or other supposed wealthy corporations. Speaking of

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slight and shadowy testimony of negligence, on which plaintiff claimed the right to proceed before the jury (he had been nonsuited), that learned jurist said: "Every person who has had any experience in courts of justice knows very well, that a case of this sort against a railway company could only be submitted to a jury with one result."

The precise question in this case is, not that no such accommodation had been furnished, but that it was not sufficiently lighted, or made visible, so that a passenger could, without danger, find it. We think the plaintiff has disarmed himself of the right to raise this question. Instead of inquiring of some railroad employee, he made inquiry of a mere stranger, and took upon himself the risk of finding the place. This, when having knowledge of the place, he must have known, if he reflected, that he was near the bluff of the river. To put the question in its mildest form, we think the plaintiff's negligence and inattention contributed proximately, if it did not cause the injury he complains of. *Welfare v. London & B. R. Co.*, L. R., 4 Q. B. 693; *Crofter v. Met. R. Co.*, L. R., 1 Com. Pl. 300.

We have not considered the question of the railroad's duty to provide such accommodation prior to, and independent of our statute on the subject. Be that as it may, that enactment has imposed the duty on the railroads, when thereto required by order of the railroad commission, and only when so required. Nor have we inquired whether plaintiff's rights as passenger had ceased, when he was safely discharged from the train. *Schouler Bailm.* 649; *Thomp. Carr. of Pass.* 412 *et seq.* Upon these questions we decide nothing.

On the undisputed testimony in this case, the railroad company was under no obligation to place a fence or guard at the bluff of the river, from which the plaintiff fell.

We need not apply these principles to the several rulings of the Circuit Court, as what we have said will furnish a sufficient guide for another trial.

Reversed and remanded.

CALLOWAY V. VARNER.

(77 Ala. 541.)

Evidence — memorandum to refresh memory.

Where a witness swears that he made an entry of certain payments in dispute in a book, at the time, he may refresh his memory by a copy thereof recently made by himself.

ACTION on a note. The opinion states the point.

L. E. Parsons, Jr., and S. J. Darby, for appellant.

W. P. Gaddis, contra.

CLOPTON, J. While the defendant was undergoing examination as a witness in his own behalf, the court refused to allow him, for the purpose of refreshing his recollection, to refer to a copy of original entries of payments on the note sued on, made by him in a book at the times the payments were severally made, which he stated was an exact copy.

Although a witness must testify to facts within his own knowledge, he may, while under examination, refer for the purpose of assisting or refreshing his memory to a memorandum made at or near the time of the occurrence of the facts, whether made by him or by another, if he knows it to be correct; but after having referred to the memorandum, he must be able to testify from independent recollection. The memorandum is not admissible in evidence, nor are its contents disclosed to the jury, unless called for by the adversary party. *Acklen v. Hickman*, 63 Ala. 494; s. c., 35 Am. Rep. 54. It need not be shown that it is necessary for the witness to assist his memory by the memorandum. "The witness, by invoking the assistance of the memorandum, admits that without such assistance, his recollection of the transaction he testifies to, had become more or less obscured."

The distinction between the purpose to refresh the memory of the witness, and the purpose to introduce in evidence the memorandum itself, must be kept in view. When the object is to have the memorandum or entries admitted as evidence, the original must be produced, or its absence satisfactorily accounted for. But where the purpose is merely to assist the memory of the witness,

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that he may thereupon testify from independent recollection, he may refer to a paper which he knows to be a correct copy of the original. As remarked by Lord ELLENBOROUGH: "It is not the memorandum that is the evidence, but the recollection of the witness." *Henry v. Lee*, 2 Chitty, 124.

In 1 Greenl. Ev., § 436, the author observes: "It does not seem necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided after inspecting it, he can speak to the facts from his own recollection." And in *Doe v. Perkins*, 3 T. R. 753, the case of *Tanner v. Taylor* is referred to, where a witness refreshed his memory, by looking at an account which he stated was a copy of his day-book, that he had left at home. Baron LEGGE said: "If he would swear positively from recollection, and the paper was only to refresh his memory, he might make use of it."

In some of the cases it has been held that a copy should not be appealed to, even to refresh the memory, when the original can be produced. Such practice would frequently put parties to unnecessary trouble, inconvenience and expense, and sometimes require what is impracticable. The tendency is rather to relax the rule; and the weight of authority is in favor of the doctrine, that a witness may, to refresh his recollection, use a copy of entries which he knows to be correct, if on inspecting it he can then testify to the facts. *Bullock v. Hunter*, 44 Md. 416; *Harrison v. Middleton*, 11 Gratt. 527; *Marcy v. Shults*, 29 N. Y. 346. The rule is subject to the limitation, that the witness must be able to testify that the original entry was, when made, a true statement of the facts, and the copy must be verified.

Where a copy is used to assist the memory, the opposite party may call for the original, to test the sufficiency and accuracy of the copy. If the original on such call is not produced, and satisfactory reasons are not given for the failure to produce it, and for using a copy, this circumstance may be considered by the jury in weighing his evidence. *Chic. & A. R. Co. v. Adler*, 56 Ill. 344; *Davis v. Jones*, 68 Me. 393.

The defendant should have been permitted to refresh his memory by the use of a copy of the original entries. There is no error in allowing the witness Bullard to assist his recollection of the year, as to which he was testifying, by referring to his memorandum-book.

Reversed and remanded.

Batton v. South and North Alabama Railroad Company.

BATTON V. SOUTH AND NORTH ALABAMA RAILROAD COMPANY.

(77 Ala. 591.)

Railroad — insults to female passenger by strangers at station.

A railroad company is not liable in damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by intruders at the station while plaintiff was awaiting the arrival of a train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage.

THE opinion states the case. The defendant had judgment below.

Watts & Son, Oliver & Oliver, for appellant.

Thomas G. Jones, contra.

SOMERVILLE, J. The action is one of novel impression for which we nowhere find a precedent. It is a suit for damages against a common carrier, a railroad company, instituted by a passenger for the alleged negligence of the carrier in failing to protect the plaintiff, who was a female, and a single woman at the time of bringing the suit, against the nuisance of indecent language and conduct of certain unknown strangers, who proved disorderly in the presence of the plaintiff, while she was seated in the ladies' waiting-room of a railroad station belonging to the road line of the defendant company. No assault on the plaintiff is shown, but only vulgar and profane language, and indecent exposure of person, and disorderly conduct, on the part of two or three intruders, who are in no wise connected with the defendant, as servants or agents.

It may be admitted that the plaintiff, Mrs. Batton, who having married since suit was brought, unites with her husband in this action, was a passenger, inasmuch as she had purchased a ticket on the road, and had entered the waiting-room at the station, not an unreasonable length of time before the passenger train was due at Calera, *en route* for the place of her destination, which is shown to be the city of Birmingham. *Wabash R. R. Co. v. Rector*, 104 Ill. 296; *Gordon v. Grand St. R. Co.*, 40 Barb. 546.

The nuisance complained of appears to have been an extraordi-

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nary occurrence, and one of which no officer or agent of the defendant company is shown to have been at the time cognizant, except a colored employee, or porter, whose duties were confined to looking after the baggage of the passengers.

The question thus presented is, whether it was the duty of the defendant to keep on hand a police force at the station for the protection of passengers against the insults or disorderly violence of strangers. If not, they would be guilty of no negligence which would render them liable in damages for breach of duty. The broad proposition is urged upon us, that it is the duty of railroad companies, when acting as common carriers, to use the utmost care in protecting passengers, and especially female passengers, not only from the violence and rudeness of its own officers and agents, but also of intruders who are strangers. We need not say that there may not be certain circumstances under which the law would impose such a duty. There are many well-considered cases which support this view, but none of them fail to impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur. In *Britton v. Atlanta & Charlotte Ry. Co.*, 88 N. C. 536; 18 Am. & Eng. R. Cas. 391; s. c., 43 Am. Rep. 748, the rule as stated to be, that "the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servants' neglect in this particular, when by the exercise of proper care, the acts of violence might have been foreseen and prevented, and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help, sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." We may assume this to be the law for the purpose of this decision, as it seems to be supported by authority. *New Orleans R. Co. v. Burke*, 53 Miss. 200; *Pittsburg R. Co. v. Hinds*, 53 Penn. St. 512; *Pittsburg R. Co. v. Pillow*, 76 Penn. St. 510; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; s. c., 2 Am. Rep. 39; *Cooley Torts*, 644, 645; *Nieto v. Clark*, 1 Cliff. 145; *Putnam v. Broadway R. Co.*, 55 N. Y. 108; s. c., 14 Am. Rep. 190.

In the case of the *Pittsburg Ry. Co. v. Hinds*, 53 Penn. St.

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512, the plaintiff, who was a passenger, sued the defendant company for an injury received by her at the hands of a mob, who defying the power of the conductor, entered the cars at a wayside station, and commenced an affray, which resulted in an injury to the plaintiff. It was held not to be the duty of the railroad companies to furnish their trains with a police force adequate to such emergencies, the court observing that "they are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration." "It is one of the accidental risks," said WOODWARD, C. J., "which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter."

It cannot be said that this duty of carriers, to take due care for the comfort and safety of passengers, is to be confined to the management of their trains and cars; for the better view is, that it extends also in a measure to what has been termed "subsidiary arrangements." 2 Rorer Railr. 951. They are bound to keep their stations in proper repair, and sufficiently lighted, and to provide reasonable accommodations for the passengers who are invited and expected to travel their roads. *Knight v. Portland R. Co.*, 56 Me. 234; *McDonald v. Chicago R. Co.*, 26 Iowa, 124. The measure of duty is admitted by all the authorities however not to be so great as it is after a passenger has boarded the train, for reasons of a manifest nature. *Balt. & Ohio R. Co. v. Schwindling*, 101 Penn. St. 258; s. c., 47 Am. Rep. 706; 8 Am. & Eng. R. Cas. 552, note.

We do not think that there is any duty to police station-houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. This is as far as the case requires us to go. The liability of a common carrier, when receiving a passenger at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests. 2 Kent. Com. 593.* There is nothing tending to prove that the company had notice of any facts which justified the expectation of such a wanton and unusual outrage to passengers. Their contract of safe-carriage imposed upon the company no implied obligation to furnish a police force for the protection of passengers against such insults. It is shown neither to be com-

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monly necessary nor customary. It was a risk which was incidental to one's presence anywhere when travelling without a protector, and it was the plaintiff's risk, not the defendant's.

We discover no error in the rulings of the court, and the judgment must be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CLARK V. EDGAR.

(84 Mo. 108.)

Fraud by directors of corporation — misrepresentation of character of bonds.

Directors of a corporation placing bonds in the hands of an agent for sale, and falsely and knowingly causing them to be indorsed "first mortgage bonds," are liable in damages to purchasers in good faith relying on such indorsement and injured by the misrepresentation.

ACTION for fraud. The opinion states the case. The plaintiff had judgment below.

W. F. Boyle and F. A. Cline, for plaintiff in error.

Crews & Booth, for defendant in error.

BLACK, J. There was judgment on demurrer to the second amended petition in this cause, in the Circuit Court, which was reversed in the Court of Appeals, and the cause is here on error to that court. The substantial averments of the petition are, that defendants were directors and officers of a corporation known as the "Martindale Zinc Company;"—that in November 1873, the corporation gave to Hill its note for \$15,000, with twenty interest notes for \$300 each, and secured the same by a deed of trust on the lands,

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machinery, etc., of said company, which was then duly recorded; that in 1875 the defendants, as directors, to raise money for the corporation, and to adjust and secure debts owing by it to some of the defendants for advances, and to settle debts of the company, on which defendants were liable as indorsers, etc., executed and used the bonds of the corporation, payable to one James as bearer, for \$1,000 each with interest coupons attached, and secured the same by a deed of trust on the same property mentioned in the former deed of trust, but without making any mention of the former incumbrance; that the defendants caused to be printed in conspicuous letters and figures on each bond the following indorsement: "First Mortgage Bonds, \$1,000, Martindale Zinc Company. Interest ten per cent. Interest and principal payable in St. Louis on the first day of January and July."

That defendants, as directors of the company, in March, 1875, placed five of said bonds in the hands of an agent for sale; that defendants in so causing the bonds to be executed with the recitals contained therein, and the indorsement thereon, represented to plaintiff that the deed of trust, executed to secure the bonds, was the first lien upon the property conveyed; that the defendants caused the agent having the bonds for sale to, and he did, induce plaintiff to purchase the bonds, untruly represent to plaintiff that the corporation was solvent and doing a prosperous business; and that the bonds were issued to save money, to extend and enlarge its business; that plaintiff had no knowledge of the existence of the prior deed of trust, and believing and relying upon all of the said representations, purchased the five bonds and paid therefor \$5,000. The petition then alleges that these verbal representations were false; that the company was not solvent; and that defendants knew them to be false, and knew that the indorsement on the bonds, to the effect that they were first mortgage bonds, was false, and that the property was subject to the prior deed of trust; that the interest coupons were paid to January, 1879, and that he then first learned of the fraud and deception; that the property was sold under the first deed of trust in October, 1878, and in 1879 the corporation suspended business, and has no property whatever, and that the bonds and remaining coupons remain unpaid.

1. The first specific ground of the demurrer is: "No representations are averred to have been made by the defendants, or either of them, such as did or should have induced plaintiff to purchase his said

bonds, or which did or should have deceived him in relation to the existence of said prior mortgage." That the representations set out in the petition did induce the plaintiff to purchase the bonds, and that those representations did deceive him in relation to the prior mortgage is clearly asserted and presents definite issues of fact, and the contrary cannot be averred by demurrer. Before we can say, as a matter of law, in the face of what is alleged in the petition, that the representations should not have induced him to make the purchase and should not have deceived him, it should clearly appear from the other facts stated, that these alleged results could not fairly follow. Now in a very technical sense these bonds were first mortgage bonds, but they were secured by a deed of trust, recited on the face of the bonds, and each bore the indorsement, "First Mortgage Bonds." A natural and reasonable meaning of all this is, that these bonds were secured by the first lien on the property, by way of deed of trust or like security. When bonds of this character are put upon the market for sale, it is not at all unreasonable to believe that those who bought would look upon this statement thereon as an assertion that they were secured by the first lien upon the property; nor are we prepared to say that such an assertion is one to be taken under all circumstances as mere matter of praise and commendation of the security so offered for sale. Of course, it may appear on trial that the plaintiff did not rely upon this statement and that it did not deceive him, but this the court cannot affirm from the petition, admitted as it is.

Nor can it be announced as a correct proposition of law, that because an examination of the records would have disclosed the true state of the property, as respects this prior incumbrance, he had no right to rely upon these alleged representations. The fact that this information was at hand and could have been ascertained by an inspection of the records is entitled to its weight, in determining whether the representations were such as would impose upon one of ordinary prudence, but it does not constitute a full answer to the charges made in the petition. Fraudulent representations in respect to title to land will entitle the injured party to relief. *Holland v. Anderson*, 38 Mo. 55; *Langdon v. Green*, 49 Mo. 363; *Bailey v. Smock*, 61 Mo. 213. But the misrepresentation must be as to something material, unknown to the injured party, relied upon by him, and such as to induce him to refrain from an examination of the records, when accessible.

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[Omitting other points.]

The judgment of the Court of Appeals is affirmed.

*Judgment affirmed.*All concur

BLUMB V. CITY OF KANSAS.

(84 Mo. 112.)

Municipal corporation — negligence — blasting in street.

A city is not liable for an injury to a passer in a street caused by the negligence of a contractor in blasting. (*See note, p. 90.*)

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

Wash Adams and *R. H. Field*, for appellant.

W. J. Scott and *D. J. Haynes*, for respondent.

HENRY, C. J. This is an action to recover damages for an injury to plaintiff, from a blast made in constructing a sewer in the City of Kansas, by which a stone was thrown upon or against plaintiff. In 1881, the city let a contract to one O'Connell, to build a district sewer in Locust street, from Tenth to Twelfth street, to be paid for in special tax bills against property in that sewer district, and in the course of constructing the sewer, it became necessary to remove, by blasting, rock that was encountered in the prosecution of the work, and it was in making a blast for that purpose that plaintiff received the injury complained of. She recovered against the city a judgment for \$2,000, from which the city has appealed. By the contract between the city and O'Connell, the former had the right to annul the contract or suspend work under it, at any time during its progress, whenever, in the judgment of the city engineer, there was good reason for doing so. It was also made obligatory upon O'Connell to discharge any workman engaged upon the work who should disobey any direction of the city engineer, as to the workmanship, or material used, or expended upon the work.

There was evidence to the effect that blasting is dangerous, but may be done by careful management, and is not necessarily dan-

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gerous. There was also evidence to the effect that the city engineer was notified by Mr. Mills, a citizen living in the vicinity, that the men engaged in the work were guilty of carelessness in making the blast, but that the city engineer took no steps to stop this careless blasting. He made no report of the fact to the city council, or remonstrance to O'Connell. On the foregoing facts the question of liability of the city to the plaintiff depends. The numerous cases cited by respondent's counsel, in relation to the duty of a city to keep its streets in a safe condition for public travel, have no application to the case at bar. The city was in the discharge of a duty in making this sewer, and the complaint here is, not that the plaintiff was injured by any defect in a street, but by the negligence, or carelessness of a contractor employed by the city to construct a work of public utility, in the performance of which she was injured by a stone, which in blasting rock was thrown against her.

The city had let the entire contract to construct the sewer to O'Connell. It had no control over the persons hired by him, except as stipulated in the contract — and that only went to the extent of obliging O'Connell to discharge any workman who should disobey any directions of the city engineer, as to the workmanship, or material used, or expended upon the work. It did not give the engineer, or the city, the right to discharge them, and this permission had no reference to the manner of doing the work, but only to the workmanship, the character of the work, and the quality of the materials used. Certainly the mere reservation of the power to suspend the work, or annul the contract, did not make the city liable for negligence in the construction of the work. If there was good ground for either suspending the work, or annulling the contract, there is no evidence that the city was so informed by the city engineer. He, it is true, was notified that O'Connell's men were negligently making blasts, but that was not communicated by him to the city council as a sufficient reason in his judgment for suspension of the work, or cancellation of the contract. It cannot be declared as a matter of law, that for any negligence of O'Connell in the prosecution of the work it was the duty of the city to suspend it, or cancel the contract. No such right was reserved in the contract. The right reserved was to suspend the work, or annul the contract whenever, in the judgment of the city engineer, there was good reason for doing so.

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The case of *Kelly v. Mayor*, 11 N. Y. 433, in its main features is similar to this. A still stronger case, in the same line, is that of *McCafferty v. S. D. & P. M. R. R. Co.*, 61 N. Y. 180 ; s. c., 19 Am. Rep. 267, where a railroad company let the contract to an individual to build its entire road, and the blasting complained of was done by men employed by a sub-contractor. The court observed : " Over these men the defendant had no control. It neither hired nor paid them, and could not control, direct, or discharge them. Hence, the rule of *respondeat superior* applies, and the principal for whom the men were working, and by whom they were employed, and not the defendant, is liable for the damage done to plaintiff." Again the court remarks : " This is not a case where the defendant contracted for work to be done, which would necessarily produce the injuries complained of. They were caused by the unskillful and negligent manner in which the blasts were conducted. The injuries were not occasioned in consequence of the omission of any duty which was incumbent on the defendant." These observations are applicable to the case at bar.

The *City of Logansport v. Dick*, 70 Ind. 80 ; s. c., 36 Am. Rep. 166, is an authority to the contrary, but in that case the court expressly recognizes the general rule of law to be that " when the work contracted for was not a nuisance *per se*, the employer of the contractor for such work will not be liable to a third person for an injury or death which results from the wrongful act or omission of such contractor, his servants, agents, or sub-contractors, in the performance of such work," and then proceeds to hold the city liable on the ground of the exclusive power conferred upon it involving a duty to keep its streets in a safe condition for use in the usual manner by travellers. In that as in this case, the plaintiff was not injured by any defect on the street but by being struck with a rock thrown by blasting in the street for the purpose of laying down water pipes. That and this case are wholly unlike that of *Russell v. Columbia*, 74 Mo. 492 ; s. c., 41 Am. Rep. 325, in which the doctrine of the liability of the city was carried as far as warranted by the authorities, and the case of *Mahanoy Township v. Scholly*, 84 Penn. St. 136, cited in support of his views by the learned judge who delivered the opinion in *Logansport v. Dick*, *supra*, does not sustain them.

There under an act of assembly " all control over the repairing of the public roads in Mahanoy township is put into the hands of

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a contractor," and the court uses the following language: "Has the township discharged its whole duty to the public when it has contracted for the making and repairing of its roads? This question is answered in the mere statement thereof. The affirmance of the proposition would be contrary to the express terms of the act itself; for the supervisor is to inspect the making and repairing of the public roads at least once every month and he is to be fully satisfied that the contracts have been fully complied with before the contractors are paid for their work." The injury sued for in that case did not occur in the prosecution of the work of repairing the highway, but was a consequence of a defect in the highway and the court distinguishes it from the case of *Painter v. Pittsburgh*, 10 Wright, 213, "and others of that class, for the accident did not happen during the progress of the work and whilst the contractor had the road in his exclusive control, but after it was turned over to the township as a finished job and in proper repair." The language in quotation is that of the court.

The case of *Painter v. Pittsburgh*, *supra*, approved in that of *Mahanoy Township v. Scholley*, *supra*, held the city of Pittsburgh not liable to one who fell into an excavation in the street made in the construction of a sewer by parties to whom the city had let the contract to build it. It was found that the negligence of the contractor in not properly guarding the excavation was the occasion of the plaintiff's injury. It is a case resembling the case of *Russell v. Columbia*, *supra*, only distinguishable from it in the fact that the construction of sewers where needed was a public duty and the excavation made by the contractors was not for a private corporation which was to derive profit from the work, while the excavation made in the street of Columbia was made by a private corporation for its own profit and gain with the permission of the city. This also distinguishes the case of *Russell v. Columbia* from that of *Barry v. St. Louis*, 17 Mo. 121, and cases of that class with which it is not in conflict. The judgment of the Circuit Court is reversed and the cause remanded.

All concur.

Reversed and remanded.

NOTE BY THE REPORTER.—The case of *Herrington v. Village of Lansingburgh*, 36 Hun, 598, is precisely similar to the principal case. The court said, citing *Pack v. Mayor*, 8 N. Y. 222, and *Kelly v. Mayor*, 11 N. Y. 482: "There was no relation of principal and agent, or of master and servant, existing between the defendant and those contractors, or between the former and the

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employees of the latter; which relation lies at the foundation of the doctrine of *respondet superior*. It must be held in mind that the work here contracted for was not a nuisance either in its manner of performance or in its result. Nothing wrongful in itself was contracted to be done or suffered. Had this been otherwise, the rule of law applicable to the case would have been different, for the corporation could not, by contract or otherwise, create or continue a nuisance and escape the consequences resulting from it. Nor was the injury here complained of caused by any negligence, careless act, or omission of duty on the part of the defendant in protecting wayfarers from danger, because of the existence in a public street of some obstruction or impediment to safe travel caused or permitted by it. From liability growing out of such omission of corporate duty the defendant could not absolve itself by contract with a third party. This was clearly shown by Judge COMSTOCK in *Storrs v City of Utica*, 17 N. Y. 104, and the distinction was also there as clearly shown between such a case and one where the injury resulted from the *manner* of performing work which could be lawfully contracted to be done. This distinction sustained a recovery in *Storr's* case, and also in *Dressell v City of Kingston*, 32 Hun. 583. It left those cases untouched by the rule laid down in *Pack v. Mayor*, and in *Kelly v. Mayor*, above cited. We do not understand that the doctrine of the cases last cited has been disturbed by the more recent decisions to which our attention has been called; on the contrary, they have been repeatedly cited as expressing the sound rule of law upon the subject discussed in them. *Vogel v. Mayor*, 92 N. Y. 10; s. c., 44 Am. Rep. 349; *McCafferty v. S. D. & P. M. R Co.*, 61 N. Y. 178; s. c., 19 Am. Rep. 267; *King v. N. Y. O., etc., R. Co.*, 66 N. Y. 181; s. c., 23 Am. Rep. 37; *Creed v. Hartman*, 29 N. Y. 591; see opinion of SELDEN, J; see also *Smith v. Simmons*, 103 Penn. St. 82; s. c., 42 Am. Rep. 113."

See *Wilson v. City of Wheeling*, 19 W. Va. 323; s. c., 42 Am. Rep. 780.

STATE V. LEABO.

(34 Mo. 168.)

Criminal law — murder — evidence — letters of prisoner's wife.

On a trial of a man for murder of his wife, the prosecution having given proof of the conduct and expressions of the wife to show that their relations were unpleasant, the prisoner may rebut it by letters of the wife to a third person, written from three to five months before her death.

CONVICTION of murder. The opinion states the case.

Holcomb & Silvers, for appellant.

D. H. McIntyre, attorney-general, for State.

HENRY, C. J. The defendant was indicted at the June term, 1884, of the Bates Circuit Court, charged with the murder of his wife on the 19th of December, 1883. The trial occurred at the same term and he was found guilty as charged and has appealed to this court. Without detailing the evidence, it is sufficient to say that although exclusively of a circumstantial nature, it is sufficient to sustain the verdict of the jury, and the only questions therefore which we shall consider relate to an instruction given for the State and the exclusion of evidence offered by defendant.

There was evidence tending to prove that the relations between defendant and his wife were not as pleasant as should exist between husband and wife. This consisted exclusively of her expressions and conduct, while on the contrary several witnesses testified, that as neighbors, they had visited his house frequently and intimately, and that he was uniformly kind and affectionate in his deportment toward her. If there was a particle of evidence, except that found in the conduct and expressions of the deceased, tending to prove that defendant was ever unkind to her, it has escaped my attention, if preserved in the bill of exceptions. The State introduced as a witness T. J. Wilson, a near neighbor of the accused, who testified that on the 19th day of December, 1883, he saw deceased coming through a field carrying her babe toward his house, and when she saw him she sat down in the grass. He went to her and she said she wanted to go to her brother's, who resided about two miles distant. They then went to the house of witness and that afternoon the defendant came for her. He asked her how she came there, and repeated the question several times before she answered, but finally she said: "You know why I came here, and I want to go to my brother's." Leabo then took witness out for a private conversation, and asked what he had better do with his wife, saying: "Something will have to be done." Witness advised him to send her brother word about it.

They returned to the house where defendant put its wraps upon the babe and said to his wife: "Come Luella, let us go home—these people don't want to be bothered with you." She then gathered her wraps and said she would go to her brother. Witness told her it was too late and the weather too bad, and she could stay at his house until morning, when he would go, or send for her brother. She said: "The neighbors had promised to take her and did not do it, and I do not want to get them into trouble as

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John (the defendant), had said he would shoot the man that interfered." Witness told her that he and John were good friends and there would be no trouble between them. She replied that if she could depend upon him that she would go back to John and stay one more night with the baby. They then went home. Several witnesses testified to circumstances tending strongly to prove that Mrs. Leabo was periodically slightly deranged before and after her marriage and when so affected expressed herself as weary of life. On one occasion after her marriage she stealthily left her husband's home and went to her father's house. For what reason is not disclosed, and that her husband went and brought her back to her home. There was no evidence, except her declaration, to show that Leabo had ever made a threat against any one who should interfere between them.

The defendant offered, but the court excluded, the deposition of Ella Finley, who was an intimate friend of the deceased, both before and after marriage, and between whom there had been an epistolary correspondence. Three letters of Mrs. Leabo to the deponent were attached to the deposition, dated respectively August 5, 1883, September 1, 1883, and September 21, 1883. In that of August 5, she wrote: "Oh! Ella, we have built us such a nice, little cosy house, and it is so snug and cosy—in fact we are so happy, our sweet little Perry and only him and me to be here." In the letter of September 1, she wrote: "I have the kindest husband in the world," and in that of September 21, she said: "Oh! Ella, pray for me, for I am tired in every way. I have a man who is worth his weight in gold. I hope you will give up single blessedness and join the benedicts, if you get such a man as I have."

The death of Mrs. Leabo occurred on the night of the 19th of December, 1883, and the first of those letters was written less than five, the second less than four, and the last about three months before her death. The evidence tending to prove her periodical derangement in connection with that relating to defendant's uniform kindness to her, had a tendency to prove that her expressions and conduct inculpatory of her husband were attributable to mental derangement, and the letters, if received, would have had the same tendency. They were admissible to disprove the existence of the motive to commit the murder, which the testimony for the State conduced to establish. In the *State v. Watkins*, 9 Conn. 47, HOSMER, C. J., said: "It was a prominent fact in the case, that

the deceased was the wife of the prisoner. The presumption thence arising, that she was not killed by her husband, or that it was not of malice aforethought, was powerful." And in the *State v. Green*, 35 Conn. 205, PARK, J., commenting upon *Watkins'* case, said: "These remarks of the chief justice accord with the common experience of mankind, that in a great majority of cases a husband will cleave unto his wife, and will protect and defend her from all injuries so far as it is in his power to do so." Again, "If this is true, then it follows that if in a given case the relation of husband and wife exists, and the inquiry is how the man treated his wife, the presumption would be that he treated her in accordance with the general rule, and it would require evidence of a contrary character to rebut the presumption, and render it as probable that he treated her ill as that he treated her kindly." Again he said: "This presumption is in addition to, and to be distinguished from the legal presumption of innocence that exists in every case in favor of a party charged with the commission of crime; and in cases where both presumptions exist, the public prosecutor must overcome the force of both and establish the contrary fact, before the accused can be found guilty."

And the extent to which the State is allowed to introduce evidence of what the wife has said and done, in order to show a lack of affection on his part toward her, will be found in *People v. McCann*, 3 Park. Crim. Rep. 294, where the State was permitted to prove that in November, 1855, the wife made a complaint against her husband for assault and battery, and this on his trial for murdering her, about eight months after the complaint made. The Supreme Court of New York held it admissible, on the ground that "it tended to show the extent of the difficulty between them," and "might properly be considered by the jury, on the question of motive." In *State v. Watkins, supra*, evidence offered by the prosecution was received in proof of an adulterous intercourse between defendant, charged with the murder of his wife and a Mrs. Burgess, the court observing that "it effectually repelled the presumption arising from the marital relation." In *People v. Williams*, 3 Park. Crim. Rep. 84, the government was permitted to prove that some time before the killing the wife had complained of her husband as a disorderly person, and he was adjudged to pay two dollars, weekly, for her support.

In actions for criminal conversation, the letters of the wife to

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her husband and to third parties are admissible as evidence to show the state of the wife's feelings. *Willis v. Bernard*, 8 Bing. Cas. in Com. Pl. 376, is one of that numerous class of cases. In that case it appears that plaintiff and his wife were residing in Upper Canada, when plaintiff, being called by business to England, left his wife, taking his mother with him. By a cross-examination of the witness who proved the above fact, defendant's counsel sought to insinuate that the plaintiff and his wife were not on good terms with each other, and that she felt offended at being left alone in Canada. Letters of the wife to a third person, while her husband was in England, expressing her attachment to her husband and her anxiety to promote his happiness, were admitted to counteract the effect of the cross-examination above referred to, and Chief Justice TINDALL said: "If a person had been present when the letter was written, and had heard her make declarations that she remained freely, voluntarily, in Canada, and without offense conceived against her husband, such declaration would have been evidence of that fact;" and further observed: "I can see no material difference between a letter addressed to the husband and a letter addressed to a third person."

It is insisted that these are exceptional cases, and not in accord with the general principles of the law of evidence. Whether in an action for criminal conversation the wife's affection had been previously alienated from her husband is not an immaterial question, and evidence such as received in *Willis v. Bernard* is not hearsay but original evidence. There is no reason or policy for admitting evidence in such a case contrary to the rules and principles of evidence applicable to other cases. TINDALL, C. J., does not place its admissibility upon that ground. He says the letter was not evidence of facts stated in it, but of the feelings of the wife. The case of *Jacobs v. Whitcomb*, 10 Cush. 256, was one in which the defendant was sued by the father of his wife for board and necessaries furnished by the father to defendant's wife, from February 24, 1849, to February 24, 1850. It appeared that a short time prior to February 16, 1849, defendant had sold his farm and engaged board for himself and wife in the family of his mother. Plaintiff introduced evidence tending to show that defendant's wife and his mother had been unfriendly and that his wife was not willing to assent to the proposed change, and this was among the causes which induced her to leave her husband, who, to meet this

evidence, offered the declaration of his wife, made to third persons, relative to said arrangement made before the 16th of February, 1849, and on that question BIGELOW, J., for the court, said: "The evidence was introduced to rebut the testimony which had been offered by the plaintiff, to prove that the wife entertained inimical feelings toward Mrs. Crosby. For this purpose we think it was competent. The plaintiff had made it part of his case to show the existence of a certain state of mind on the part of the wife. It was therefore necessary to meet it. This he could well do by proving her declaration on the subject, more especially as she was not a competent witness."

In *Walton v. Green*, 1 Car. & P. 621, cited in the above case, a husband was sued by a stranger for boarding and lodging the defendant's wife, he having turned her out of doors. The defense was that she had previously committed adultery, and the defendant was permitted to give in evidence her statement to one of his clerks that she had had criminal intercourse with a person whom she named. Two letters, written to her by the officers of a British regiment, were also admitted as evidence for the defense. In the case at bar, letters written by the wife to the husband would have been open to the same objection made to those that were offered, and if the latter could be excluded, upon the same principle, the former would be. We do not decide that such testimony is admissible under all circumstances; but when the plaintiff makes it a part of his case to show the existence of bad blood between the husband and wife, in order to establish a motive for guilty conduct ascribed to him, it is admissible. If the State may introduce evidence of her declarations and conduct, inculpatory of her husband, it is equally his right to have benefit of her declarations and conduct, to meet such evidence; and what better evidence could there be of a husband's affection for his wife than her confidential letters to a friend and companion of her youth, in which she declares that he is the "kindest husband in the world," "worth his weight in gold," and expressing a wish that if that friend should ever marry she may "get such a man as she has." The evidence offered by Leabo was no more hearsay than that received in the case above cited. Will such evidence be admitted in a civil action, in resistance of a money demand, and refused in a criminal prosecution, in which one's life or liberty is at peril? Has the law less regard for the life or liberty of a citizen than for his goods and chattels?

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In the case of *Aveson v. Lord Kinnaird*, 6 East, 188, which was an action on a policy of insurance effected by the husband on the life of his wife, the surgeon who examined the woman on behalf of the insurer testified for plaintiff, that "she had then good health," and that he formed his opinion principally from her answers to his inquiries. The defense then called a witness who testified that he saw the deceased a day or two after the surgeon had examined her, and she then complained of being unwell, and said she was unwell when she went to see the surgeon. It was assumed by all the judges that what was said by the deceased to the surgeon was evidence of the state of health at that time, and they all thought that this evidence, having been produced by the plaintiff, it was open to defendant to rebut it by showing that she had made different statements on another occasion upon the same subject. I have on this occasion thus extensively discussed the question involved, because it is one of first impression in this State, and of considerable practical importance in the administration of the criminal law. I think that the court erred in excluding the deposition.

[Omitting minor points.]

We reverse the judgment and remand the cause solely because the court excluded the deposition of Ella Finley.

Reversed and remanded.

All the judges concur. NORTON J., in the result.

 MISSOURI PACIFIC RAILWAY COMPANY V. TYGARD.

(84 Mo. 203.)

Railroad — subscription — validity.

A subscription for building a railroad was made on the conditions that the road should be completed and put into operation to a certain town by a certain date, and that it should locate a station within a specified distance of the court-house in the town. The road was graded to the town by the appointed time, but was not fully completed until several months later, and in the meantime the company used about a mile of another railroad. *Held*, (1) that the contract for completion was substantially complied with; (2) that the distance of the station from the court-house should be measured in a straight line; (3) that the contract for locating the station was lawful.*

* See 86 Am. Rep. 214.

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ACTION on subscriptions to railroads. The opinion states the case. The plaintiff had judgment below.

A. Henry, T. J. Galloway, P. C. Fulkerson, W. P. Johnson, and E. J. Smith, for appellants.

Railey & Burney, for respondent.

BLACK, J. This was a suit to recover the possession of one hundred and seventy-three notes or subscription contracts given by various persons to the Lexington and Southern Company, to aid in the construction of that road. The defendant, Tygard, held the notes in compliance with the stipulation contained in each note to the effect that if the company should complete and put in operation its railway of standard gauge from the town of Pleasant Hill in Cass county to the city of Butler in Bates county, and should establish and construct a depot within three-quarters of a mile of the court-house in the city of Butler, all to be done and completed as aforesaid by or before the first day of January, 1881, then the notes were to become the property of the company, were to be delivered to it and were to be paid according to their tenor; but if the company failed to do so then the notes were to be delivered to the makers. The persons who had made these notes were made defendants on motion of Tygard. After the notes were given and in 1880, this company was consolidated with the plaintiff, which became entitled to them on complying with these conditions in the contracts stated. It is admitted that the road was completed and put in operation from Butler to a point within one mile of Pleasant Hill and that the depot was established and constructed within the specified time; but the defense is that the depot was not located within the corporate limits of the city of Butler, nor within three-quarters of a mile of the court-house; that one mile of the Pleasant Hill end of the road was not completed within the specified time, and that the notes ought to be held void from considerations of public policy.

1. An inspection of the contract will show no agreement to place the depot or to build the road into the corporate limits of Butler. There was some evidence tending to show that the depot as located was not within three-quarters of a mile of the court-house, by any then travelled road, but it was conceded that the depot was within

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less than that by direct measurement, and this the Circuit Court held sufficient. This ruling is assigned as error. Where a line is given in a deed, or commissioner's report, to be run from one point of measurement to another, it must be taken to mean a straight line, unless there is a different intent expressed. *Allen v. Kingsbury*, 16 Pick. 238; *Jenks v. Morgan*, 6 Gray, 449; *Henshaw v. Mullens*, 121 Mass. 143; *Butler v. Barr*, 18 Mo. 357. Where the road is to be located within a specified distance of a certain point, and nothing is said as to the manner of measurement, the law is well settled that the distance is to be measured by a direct line, and not by the travelled route. *Railroad v. Rich*, 33 Iowa, 113; *Pierce Railroads*, 63, 1 Rorer Railroads, 482; 1 Redfield Railr. (6th ed.) 414.

2. On trial it was admitted that this road formed a junction with the Atchison, Topeka and Santa Fe railroad, at a point one mile from Pleasant Hill, and from that point to Pleasant Hill the L. & S. road used the track of the A., T. & S. F. R. R. to May, 1881. This mile of the L. & S. road was graded on January, 1881, but not ironed and put in use until May, 1881; but the road was in full operation from Pleasant Hill to Butler and beyond at the stipulated time. Undisputed evidence also shows that the plaintiff owned its depot, stock yards, and tracks thereto at Pleasant Hill, which the A., T. & S. F. road used. *State v. Town of Clark*, 23 Minn. 422, was a proceeding by *mandamus* to compel the town to issue bonds, which were to be issued on condition that the railroad company should, on or before a specified day, have completed, ironed, and equipped its line of road from Wells to Mankato, and have the same in operation for transportation of passengers and freight. The road was completed to a point within a fourth and half mile of Wells, and from that point it ran over the track of another road into the village of Wells, and this was held to be a substantial compliance with the contract. *People v. Holden*, 82 Ill. 93, was a like proceeding. The bonds were not to be delivered until the railroad was completed, equipped, and in successful operation from Paris to Danville. The road was thus built from Paris to a point one mile from Danville, where it formed a connection with the Toledo, Wabash and Western railway, and by an arrangement with that road ran over its track to Danville, and this was held to be a compliance with the terms of the contract. There must be a fair and substantial compliance with the conditions of the contract, and this is all that is required. These cases before cited, and the cases of

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Courtwright v. Deeds, 37 Iowa, 503; *State v. City of Hastings*, 24 Minn. 78; *Ry. Co. v. Stockton*, 51 Cal. 834, and *Jackson v. Stockbridge*, 29 Tex. 394, will serve to show what the courts of other States have held to be such substantial compliance. The road was fully completed for all purposes of transportation of passengers and freight and put into full operation, and this was the evident object which the parties had in view. The terms of the contract are to "complete and put in operation," and this was done, though the company did not own one mile of the track which it then used. This defense, we conclude, is without merit.

3. Defendants in their answer allege, in substance, that they gave these contracts for the purpose of offering to the officers of the company a donation to induce them to vary the line of the road so as to be of greatest benefit to defendants; that such officers had proposed to change the line of survey so as to be of special benefit to defendants, if they, defendants, would sign the agreement, and that the notes or contracts were made in the name of the company for that purpose. There was no evidence offered tending to show that these agreements were made for the personal benefit of any officer, but there was evidence offered tending to show that they were made to induce a variation in the proposed line of the road, which was excluded by the court, but what the variation proposed to be shown was, does not satisfactorily appear. The defendants place much reliance upon the case of the *Pacific R. Co. v. Seely*, 45 Mo. 212, but it is apparent there is but little or no analogy between this case and that. There the contract in part was to lay off one hundred and sixty acres of land into town lots, and to make a deed to one-fourth of the lots to such persons as the directors might designate, in consideration that plaintiff would locate a station on the lands. It was a speculation in which the corporation had no right to engage, and a flagrant abuse of its corporate powers. The court rightfully enough declined to lend its aid in the specific execution of such a contract.

This case is much more analogous to that of *Workman v. Campbell*, 46 Mo. 306, where the suit was based upon a subscription made by the defendant to pay certain moneys to be used in securing the location of the depot of the Pacific railroad on certain lands near Knobnoster, and in consideration of which subscription the plaintiff did secure the depot at the proposed place, and the contract was held to be valid by the court. *Bank v. Hendrie*, 49

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Iowa, 403; s. c., 31 Am. Rep. 153, the notes sued upon were given to secure the building of the railroad then in question to Council Bluffs. The road had been so located as to reach the river many miles from that place. The officers of the corporation proposed, upon sufficient inducements in the way of contributions, to so change the route as to strike the river at Council Bluffs. This proposition was accepted and the notes there sued upon were given for the defendants' subscriptions, and were held to be valid. Many authorities are to the same effect, certainly to the effect that a subscription as a donation to induce the location of a railroad at a particular place is not void. *Berryman v. R. Co.*, 14 Bush, 755; *R. Co. v. Baab*, 9 Watts, 458; *McClure v. R. Co.*, 9 Kans. 373.

Contracts made with an officer of a railroad corporation and for his personal benefit to induce him to procure a particular location, stand upon other and different grounds, and are not to be upheld. This corporation was organized under the general laws of this State and had the right to receive donations to aid in its construction. Section 765, Revised Statutes, 1879. There was nothing shown or offered to be shown in this case which disclosed that these contracts were detrimental to the public welfare. Indeed it would seem that the location of the road near to Butler would greatly subserve the public interest. It was the policy of the legislature of this State for many years to allow cities to make conditional subscriptions to railroads, and they were made for the express purpose of procuring a location at a particular place. The court did not err in directing a verdict for plaintiff.

Judgment affirmed.

All concur.

LEE V. SMITH.

(84 Mo. 304.)

Banks — cashier — certifying certificate of deposit to himself.

A certificate of deposit made by the cashier of a bank to himself is void on its face and confers no rights on the purchaser.

THE opinion states the case.

Draffer & Williams, for appellant.

W. H. Watts and *Henry Smith*, for respondent.

MARTIN, C. This is a proceeding on appeal from an action of an assignee in refusing to allow four certificates of deposit as just demands in favor of plaintiff against the bank assets held by defendant as assignee. After the appeal was entered in the Circuit Court, the parties appeared by their respective attorneys and waived a trial by jury.

[Omitting a minor point.]

The certificates of deposit which the court refused to allow in the trial anew before it, are four in number for \$1,000 each, and resemble in all respects as to the time when payable, the following one of the number :

MISSOURI VALLEY BANK,
KANSAS CITY, Mo., Nov. 31, 1880. }

"No. 1977.

"R. J. Alther has deposited in this bank \$1,000 payable to the order of himself, four months on the return of this certificate properly indorsed without interest.

"ROBERT J. ALTHER,

"*Cashier Missouri Valley Bank.*"

Indorsed as follows :

"Pay John Lee, or order.

ROBT. J. ALTHER.

It had been returned to Mr. Lee after an indorsement by him for collection. It is necessary to allude briefly to the transactions out of which these certificates arose. Mr. Robert J. Alther had been a member of the firm of R. J. Alther & Co., of St. Louis. While in said firm he became indebted to C. F. Aehle of Boonville, who was a member of the banking firm under the name and style of Aehle, Dunnica & Co., which was succeeded by Aehle, Lee & Dunnica, of which the plaintiff was a member. This indebtedness was for money advanced and obligations incurred and discharged by Mr. Aehle to the use of R. J. Alther & Co. Upon request of Mr. Aehle, Mr. Alther, in December, 1876, forwarded to him the firm note of R. J. Alther & Co., in the sum of \$6,000, payable one day after date. Upon dissolution of the firm of Aehle, Lee & Dunnica, this note turned up as a part of the assets thereof, and as such it

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came into the hands of Mr. Lee, who attended to the settlement of its affairs and was looking around for the capital he had put into the concern. In the meantime Mr. Alther withdrew from the firm of R. J. Alther & Co., after discovering that its liabilities were getting the advantage of its assets, and settled in Kansas City, becoming soon thereafter cashier of the Missouri Valley Bank. Rightfully assuming that such positions of responsibility are not usually bestowed upon insolvent or impecunious persons, Mr. Lee dispatched his attorney thither for the purpose of collecting his note. Mr. Alther was given to understand that he would have to settle the note or it would be enforced against him by suit. Thereupon Mr. Alther, protesting against the validity and consideration of the note, finally thought prudent to settle for it. He says he was induced to do this on account of the position he held and out of fear of a run on the bank which a suit against him might inaugurate. In settlement of the note at its face value he paid to Mr. Lee's attorney \$1,000 in currency, and delivered to him five certificates of deposit on the bank for \$1,000 each, payable in three, four, five, six and seven months from date. The first one he said he paid when it was presented to him as cashier through the clearing house. The other four are asserted for allowance against the bank in this case. Upon receiving the certificates the note was delivered up to Mr. Alther.

Now, at the time of issuing the certificates of the bank in settlement of his private debts, Mr. Alther had no funds on deposit in the bank; in fact his account in the bank was overdrawn. The certificates were not filled out in regular order from the blank certificate book but were taken from the back part thereof. No memorandum of amounts or persons was left on the stubs remaining in the book to indicate for what or to whom the certificates were issued. Mr. Alther had no special authority for issuing them outside of his authority as cashier. Neither was the fact of their issue known to any of the other officers or employees of the bank. The attitude which the plaintiff occupies toward the certificates as indicated in the argument of his counsel is that he accepted them as transferred to him by Mr. Alther in absolute payment of the note of R. J. Alther & Co., which was surrendered to Mr. Alther without any knowledge of the condition of accounts between Mr. Alther and the bank, but believing that the funds were on deposit as represented in the certificates and as orally stated by Mr. Alther. Having been issued by the proper officer he contends that they should

be binding upon the bank. He also contends that the cashier had special implied authority to issue them, resulting from certain facts appearing in evidence to the effect that the bank had no by-laws or rules that the president was generally absent and that the directors gave no personal attention to its affairs, but knowingly permitted Mr. Alther to do about what he pleased with the funds of the institution. This position cannot be successfully maintained.

It is unnecessary to consider whether the cashier of a bank has authority, as such, to certify the existence of funds in the absence of actual deposits, for no such general authority, if possessed by him, would justify him in certifying his own check, or in issuing, as he did in this case, a certificate of deposit to himself. He could not do this without representing both sides to the transaction, thus perfecting a contract through only one consenting mind, a thing positively forbidden to agents and trustees in every department of agency and trust. The law will not permit an agent's private interests to come between himself and his principal. Its actual presence always disables the agent from binding his principal in the transaction. *Clafin v. Farmers & Citizens' Bank*, 25 N. Y. 293; *Mercantile Mutual Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557. Accordingly when Mr. Alther, as cashier of the bank, certified that Mr. Alther had deposited the money called for in these certificates, and that the bank would pay to his order the amounts so deposited, upon return of the certificates, he undertook to bind his principal in a method forbidden by law. Therefore these certificates were presumptively void upon their face, a fact which must have been apparent to Mr. Lee, or any one else inspecting them. The plaintiff, on accepting them, could not maintain that he was a *bona fide* holder without notice of the cashier's want of authority to bind the bank in issuing them. No implied authority in the cashier could arise from the general course of business in the bank. Nothing short of a subsequent confirmation of them by officers properly representing the bank could give to them any force or validity whatever.

As the evidence fails to disclose any such confirmation, the decision of the court denying allowance of them as lawful demands against the assets of the bank should be affirmed, and it is so ordered.

Judgment affirmed.

All concur.

Vawter v. Missouri Pacific Railway Company.

VAWTER v. MISSOURI PACIFIC RAILWAY COMPANY.

(84 Mo. 879.)

Conflict of laws — negligence causing death.

An administrator appointed in Missouri cannot maintain an action there for death of his intestate in Kansas, such action being allowed by the statute of Kansas but not by that of Missouri.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case.

H. S. Priest and T. J. Portis, for appellant.

James Ellison and W. C. Ellison, for respondent.

BLACK, J. Plaintiff is the widow of W. R. Vawter; and was appointed administratrix of his estate by the Probate Court of Schuyler county, Missouri. She brings this suit in her representative capacity against the defendant to recover damages for the death of her husband. He was in the employ of the defendant. While making a trip over the road, his train left the main track, at Parsons in the State of Kansas, came in collision with a stock train, and he was killed. His death, it is alleged, was caused by the negligence of defendant's servants, in leaving the switch at that place in an improper position. Defendant contends that he and those engaged with him on his train were guilty of negligence in running the train at a rate of speed prohibited by the defendant's rules, because of which he was killed.

1. Civil actions for the death of a person caused by the wrongful act, neglect, or omission of another, did not exist at common law. A right of action in such cases is given by the statute law of many of the States. These statutes have no extra-territorial effect, so that as is conceded in this case, the plaintiff, if she can recover at all, must do so by force of the statutes of the State of Kansas, and not because of any statute of this State. To that end she pleads and bases her right to recover upon two sections of the statutes of that State, which are as follows: "When the death of one is caused by a wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived,

*See *Debevoise v. N. Y. Cent., etc., R. Co.* (98 N. Y. 377), 50 Am. Rep. 688.

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against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased." Also, "Every railroad company organized, or doing business in this State, shall be liable for all damages done to employees of such company in consequence of any negligence of its agents, or any mismanagement of its engineers, or other employees to any person sustaining such damages."

The question arises whether she can maintain this action in this State. The following authorities support her claim of right so to do: *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 38; s. c., 38 Am. Rep. 491; *Dennick v. R. Co.*, 103 U. S. 11. The first of these two cases is, in a large degree, placed upon the ground that the statute of the State of Connecticut, where the cause of action accrued, was in all material respects the same as that of New York. The other was also brought in the State of New York, though the action was founded on the statute of New Jersey. In both of these States it would seem the personal representative was the proper and only party to sue in such cases. There is no material difference between the statute of the State of Kansas and that of the State of Illinois in the respect under consideration. The St. Louis Court of Appeals, in *Stoeckman v. Terre Haute & Ind. R. Co.*, 15 Mo. App. 503, came to the conclusion that an administrator appointed in this State might prosecute such a suit under the statute of Illinois. In *Taylor's Adm'r v. Penn. Co.*, 78 Ky. 348; s. c., 39 Am. Rep. 244, the death occurred in the State of Indiana. The administratrix of the estate of the deceased was appointed in the State of Kentucky, and brought her suit in the courts of that State, founding her right to recover upon a statute of the State of Indiana, which is precisely the same as the first of the sections of the statute of Kansas above quoted. The court in that case denied the right and power of the administratrix to prosecute the suit in the courts of the State of Kentucky and among other things said: "A Kentucky administrator suing in a Kentucky court must be able to show that the laws of Kentucky entitle him to the thing sued for. He cannot receive his office from one jurisdiction, and appeal to the laws of another jurisdiction for rights and powers not given by the law which created him." Other courts, where the same question

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was involved, have been equally positive in the assertion of the same doctrine. *Woodard v. Mich. South. & Northern Ind. R. Co.*, 10 Ohio St. 121; *Richardson v. N. Y. Cent. R. Co.*, 98 Mass. 85.

By the statute of Kansas the right of action accrues to the personal representative, the executor or administrator. The damages inure to the exclusive benefit of the widow and children, or next of kin, and do not constitute assets of the estate but rather a trust fund for the designated persons. Here the amount is fixed, is in part of the nature of a penalty, and can only be recovered by designated relatives. The rule of law which exempts the master from liability for damages occasioned to one servant by the negligent act of a fellow servant is in force in this State, but by the statute of that State, so far as relates to employees of railroad companies, has been abrogated by the statute pleaded in this case. An administrator appointed in this State receives his power and authority to sue from the laws of this State and from this State alone to which he is amenable throughout the entire course of the administration. There is no statute of this State by which he has or can have anything to do with suits of this character or the damages when recovered. He may by section 96, Revised Statutes, 1879, bring an action for all wrongs done to the property rights or interests of the deceased against the wrong-doer. Section 97 provides: "The preceding section shall not extend to actions * * * on the case for injuries * * * to the person of the testator or intestate of any executor or administrator." For fear that section 96 might be construed to confer upon the administrator a right to sue for injuries to the person of the intestate the next, as will be seen, declares in express terms that he shall not do so. To sustain this action we must say he may maintain such actions, and that too because of a statute of another State. In short we must convert him into a trustee for purposes entirely foreign to any duty devolved upon him as administrator by the laws of this State. This we cannot do.

We understand a general law of the State of Kansas permits foreign administrators to sue and be sued in the courts of that State, and that he may there prosecute a suit under this damage act, if the law of the State from which he gets his appointment gives him like powers. *R. Co. v. Cutter*, 16 Kans. 568. But if the law of the State where the appointment is made prohibits him from prosecuting an action for damages occasioned by the wrongful act of another and resulting in death, then he cannot maintain the suit

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in the courts of that State. This appears to be the result of a recent decision, a short note of which is given in the *Kansas Law Journal* of February 14, 1885. Most courts and text writers of acknowledged authority hold that these actions given by statute for causing death by neglect, default or a wrongful act, can only be enforced by the courts of jurisdiction where the wrong is suffered and the right of action is given. Other courts treat such actions as transitory and enforce the statute law of the State where the injury was suffered, though the action be not one of any general recognized right. Others again entertain such actions when the laws of the two States upon the same subject are similar. If these statutes are administered outside of the jurisdiction where enacted, it must be done on principles of comity. Such principles are not to be narrowed but they do not justify the courts in going to the extent to which we must go to sustain this action, i. e., to say to an administrator, you may sue in the county of the State of your appointment under the law of another State when denied the right to bring the same or a like suit by the laws of the State conferring the appointment.

Judgment of the trial court is reversed.

Judgment reversed.

The other judges concur.

CASES
IN THE
SUPREME COURT
AND THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

INGWERSEN V. RANKIN.

(47 N. J. Law, 18.)

Landlord and tenant — nuisance — liability to third.

A nuisance was created by a lessee under a lease by which he had covenanted to keep the premises in repair. This nuisance became injurious to a third person. Subsequently, and on the expiration of the lease, the lease was renewed with like covenants, the landlord not taking actual possession, but knowing of the injury. *Held*, that the landlord was liable for the injury.

ACTION for nuisance. The opinion states the case. The defendant had judgment below.

John Linn, for rule.

Wm. A. Lewis, contra.

MAGIE, J. Plaintiff was tenant of defendants under a lease

which demised to him the basement of a building for the term of five years commencing May 1, 1876.

His suit against defendants was brought to recover damages for injuries alleged to have been suffered by him by reason of improper management of the remainder of the building. The evidence was that shortly after plaintiff's term commenced water began to flow upon the demised premises, and the flow so increased that plaintiff claimed that he was obliged to abandon them and was thus deprived of their use for a large part of the term. Plaintiff insisted that the water came from defects in the pipes used to distribute water through the building, and that defendants were liable therefor, either because the defective pipes were in parts of the building retained in their possession or in parts for which they were responsible.

There was evidence from which it was possible to infer that the defects existed in the pipes in a saloon above the basement. The saloon had been leased by defendants, before plaintiff's term commenced, to Owen Markey. By the lease, Markey had covenanted to keep the premises in repair. The lease expired May 1, 1877, and just before its expiration defendants gave Markey a new lease of the saloon for a term extending beyond plaintiff's term. By that lease Markey also covenanted to keep the premises in repair.

It therefore became necessary to instruct the jury as to the liability of defendants upon that state of facts and the inferences which could be drawn therefrom. The learned judge before whom the case was tried gave instructions in regard to defendants' liability under the lease to plaintiff, and as occupiers of such parts of the building as were retained in their possession, which instructions have not been objected to and are unobjectionable.

The objection plaintiff makes, and on which he insists that the verdict, which was for defendants, should be set aside, is directed to the following passage of the charge: "One theory upon which I understand the plaintiff to put his case is that this pipe, when the first term of Markey expired, had by reason of Markey's negligence in the repair, or not keeping in repair, got to be ruinous, and that the landlord, while such was the case, executed a new lease, granted a new term to Markey, and thus adopted as his own this condition of things in respect to this pipe. There was no actual taking possession of these premises by the landlord between the termination of the first term and the commencement of the second of Markey.

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Under the first term Markey was bound to repair; under the second term the same obligation was continued in his lease in express terms. The same duty that existed in the first term ran on directly into the second. I do not think the expiration of the term and the reletting of the premises to the same tenant, on the same conditions as to repairs, changed the defendant's liability in this case. And upon that theory I am unable to see any ground upon which the plaintiff would be entitled to recover."

Since this instruction required a verdict for defendants, if the conclusion of the jury was that the water escaped from pipes in the saloon, which had become worn out during the first lease to Markey, it is clear, that if the instruction was erroneous, plaintiff may have been injured by it.

If the defective pipes were part of the premises demised to plaintiff, defendants' liability would be measured by their contract with plaintiff. But if defective pipes, located without the premises demised to plaintiff, constantly flowed water upon those premises, they constituted a nuisance for which a liability to plaintiff arose on the part of him who originally created it and of him who maintained it.

If one create a nuisance on his own premises, and thus become liable for its erection and also for its maintenance, he cannot escape the latter liability by demising the premises whereon the nuisance is. This was established in the leading case of *Rosewell v. Prior*, 2 Salk. 460; s. c., 1 Ld. Raym. 713. That was an action against one who had erected a shed which stopped plaintiff's ancient lights. There had been a recovery against him for the erection, and this action was for continuance of the nuisance. The erection was by a tenant for years, who had afterward made an under-lease to one S. The question was whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease. It was held that the action would lie upon the ground that defendant had transferred the premises with the original wrong, and this demise affirmed the continuance of it. It was also held that the action would lie against either tenant, at plaintiff's election.

This doctrine has been restated and developed in many cases, which have been said to be all reconciled in the proposition that where the injury is the result of the misfeasance or nonfeasance of the lessor the party suffering damages may sue him. *Todd v. Flight*,

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9 C. B. (N. S.) 377. A distinction has been taken between the liability of the landlord and that of the tenant, and the former has been restricted to that which is a nuisance in its very essence and nature at the time of letting, and not something merely capable of being rendered a nuisance by the tenant. *Gandy v. Jubber*, 5 B. & S. 87. But there are cases which affirm the lessor's liability for a nuisance which was a necessary, contemplated or probable result of the use of the thing leased for the purposes of which it was leased. *Fish v. Dodge*, 4 Den. 311; s. c., 47 Am. Dec. 254; *Rex v. Pedley*, 1 Ad. & El. 822; *House v. Metcalf*, 27 Conn. 631; Wood Land. & Ten., § 639, and cases in notes.

Besides the above cited cases, the following illustrate the principle: *Nelson v. Liverpool Brewing Co.*, L. R., 2 C. P. 311; *Staple v. Spring*, 10 Mass. 72; *Saltonstall v. Banker*, 8 Gray, 195; *Swords v. Edgar*, 59 N. Y. 28; s. c., 17 Am. Rep. 295; *Waggoner v. Jermaine*, 3 Den. 306; *McCallum v. Hutchinson*, 7 U. C. C. P. 508. The principle was adopted in this State by the Court of Errors in *Durant v. Palmer*, 29 N. J. L. 544.

I am unable to bring my mind to the conclusion that the landlord's liability in such case will be discharged by reason of his having required the tenant to stipulate to keep the demised premises in repair. Such a view seems to have been taken in *Pretty v. Brickmore*, L. R., 8 C. P. 401, which case was followed and approved in *Gwinnell v. Eamer*, L. R., 10 C. P. 658. In my judgment it is impossible to reconcile those cases with the principle established by the leading cases or with reason. For it is absurd to say that one who is liable for continuing a nuisance may escape that liability by merely taking a contract from another to remedy the nuisance by repairs. The tenant cannot, either by reason of his tenancy or by reason of his contract to repair, be interposed between the person injured by the nuisance and the landlord liable therefor. Shearm. & Redf. Neg., § 502. In *Swords v. Edgar*, *ubi supra*, the Court of Appeals of New York disapproved of *Pretty v. Brickmore*, and by a unanimous judgment held that a lessee's covenant to repair would not shield the lessor from liability.

In some cases knowledge on the part of the lessor, of the existence of the nuisance at the time of the demise is held to be an essential element of his liability. *Gwinnell v. Eamer*, *ubi supra*; *State v. Williams*, 80 N. J. L. 102. A different view was expressed by the Queen's Bench in *Gandy v. Jubber*, *ubi supra*, but as the

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plaintiff in that case, upon error in the Exchequer Chamber, accepted a *stet processus* on the recommendation of the court, the weight of that case may be considered lessened.

If such knowledge is an essential element of the landlord's liability, the cases of *Pretty v. Brickmore* and *Gwinnell v. Eamer* may be reconciled with the other cases. In the latter case it appears that the lessor demised in ignorance of the defect. In the former case the same ignorance may be inferred.

But it is unnecessary to determine in this case how far a knowledge on the landlord's part, of the ruinous condition of the premises, is essential to be shown to establish his liability, for it clearly appears that defendants, before making Markey's second lease, had knowledge of the injury to plaintiff, and of facts from which it could be inferred that it proceeded from defects on Markey's premises.

Nor do I perceive how the liability of the landlord in such cases will be diminished by the fact that he renewed the tenant's lease without retaking actual possession. Such a conclusion would be opposed to the principles creating and governing his liability. If a nuisance is created during a term already existing, no liability falls on the landlord pending that term, for the reason that he has no legal means of abating the nuisance. He cannot enter upon his tenant's possession for that purpose, and would be a trespasser if he did so. But when the term expires his right of entry and power to abate at once arise and for that reason a liability commences. If he declines to re-enter and abate the nuisance, and relets the premises, the liability which arose at the termination of the term will be neither discharged nor evaded. The test of his liability in such case is his power to have remedied the wrong. If he has, but fails to exercise such power his liability remains.

The cases seem to be uniform in this view. *Whalen v. Gloucester*, 4 Hun, 24; *Rex v. Pedley*, *ubi supra*; *Rich v. Basterfield*, 4 C. B. 782; *Clancey v. Byrne*, 56 N. Y. 129; s. c., 15 Am. Rep. 391. In *Gandy v. Jubber*, the landlord was held liable in case of a tenancy from year to year which he could have terminated by notice which he failed to give.

These considerations constrain me to conclude that the charge was erroneous in the respect complained of. The rule must therefore be made absolute.

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EVENING JOURNAL ASSOCIATION V. STATE BOARD OF ASSESSORS.

(47 N. J. Law, 28.)

Statute — "manufacturer."

SUFFICIENTLY reported, 52 Am. Rep. 107.

UNITED COMPANIES V. WELDON.

(47 N. J. Law, 59.)

Constitutional law — change of corporate charter.

An irrevocable railroad charter gave the power to condemn lands, and provided for an appeal by the land-owner to a certain court. *Held*, that a general statute substituting another court to which such appeal was to be made was constitutional.

PROCEEDINGS to condemn lands. The opinion states the case.

J. B. Vredenburg, for plaintiff in certiorari.

Wm. Brinkerhoff, contra.

DEPUE, J. By an act of the legislature, passed March 9, 1877, the legislature enacted that in all cases where it is provided by any act of incorporation or law of the State that any owner of real estate, land or materials taken in pursuance of such act or law may appeal from the decision or judgment of commissioners appointed under such act or law, to the Court of Common Pleas in the county where the lands lie, such appeal should thereafter be made to the Circuit Court of such county, and that such appeal might be taken by either party, reserving to either party the right of trial by jury in such court. Rev. 1278. This act, as a matter of construction, would operate to repeal the provisions of the charter of this company, allowing an appeal to the Court of Common Pleas, and substitute in its place an appeal to the Circuit Court. *Mech. Bank v. Bridges*, 1 Vroom, 112; *Industrial School v. Whitehead*, 2 Beas. 290; *State v. Com'r of Railroad Taxation*, 37 N. J. L. 228.

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The appellant contends that the act of 1877 is unconstitutional and void as applied to the company's charter, and is therefore inoperative to change the forum of appeal, there being no proof that the company had accepted the provisions of the act. The application for the appointment of commissioners was made to a justice of the Supreme Court, in compliance with the original charter, and the proceedings, down to the filing of the commissioners' report, were had under that authority. In these proceedings the company has not in any respect acted under or exercised any power conferred by the act of 1877. There was therefore no implied acceptance of this act by the company, nor does there appear to have been any acceptance of its provisions by direct action or otherwise.

It was insisted by the counsel of the prosecutor that the act of 1877, having given the company a right which it had not before, the right to appeal, was, in that respect, for its advantage, and the acceptance of the act would be presumed. I doubt very much the solidity of the position that an amendment to a charter which contains some feature advantageous to the corporation will be presumed to have been accepted, in the absence of proof that the company in some way acted under it, as applied to corporations having irrepealable charters. We prefer to place this case on the more stable ground that the act of 1877 wrought no change in the company's charter which was within the constitutional prohibition.

The charter of a corporation is a contract with the State, and if irrepealable, is protected by the same constitutional provisions which render inviolable contracts between individuals; that the legislature shall not pass any law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made. The rules for the construction of these constitutional prohibitions, as applicable to contracts between individuals, apply as well to contracts by the State with corporations created under charters which are irrepealable.

In *Rader v. S. E. Road District*, 36 N. J. L. 273, the legislature projected a plan of public improvement, and created a special municipal body as a corporation to contract for and execute the work, and make assessments to provide the means of payment. This corporation made a contract with a contractor to perform part of the work. Subsequently the legislature extinguished the original corporation and submitted in its place another municipal body with exactly the same functions and powers, and imposed upon it the

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obligation to perform the contracts of its predecessors. The contractor brought suit on his contract against the original corporation, and contended that the repealing act either impaired the obligation of his contract or deprived him of a remedy upon it which he had when the contract was made, and was therefore unconstitutional and void. This court held otherwise, and decided that the repealing act was constitutional; that it was competent for the legislature to change the form and mode of procedure for the enforcement of the contract, provided that no substantial right of the contracting party was impaired. To the same effect is *Munday v. Rahway*, 43 N. J. L. 338; s. c., 44 N. J. L. 395. A subscription to the stock of a corporation is a contract of the subscriber with the corporation then existing. This contract is not abrogated by a subsequent change in the name of the corporation by legislative authority. *D. & A. R. R. Co. v. Irick*, 23 N. J. L. 321. The legislature does not impair the obligation of a contract by limiting or altering the modes of proceeding for enforcing it, provided that the remedy be not withheld or embarrassed with conditions or restrictions which impair the value of the right. The legislature may change the remedy, provided no substantial right secured by the contract is impaired. *Tennessee v. Sneed*, 96 U. S. 69; *South Carolina v. Gaillard*, 101 U. S. 433-439; *Morawetz Corp.*, § 448. These principles are applicable to the case in hand. The original charter of the company gave the land owner the same right of appeal as the act of 1877 did, and the right of either party to trial by jury given by the charter is retained in the subsequent act. The only change that was made was in the mode of procedure — in the forum in which the appeal should be tried. *Railroad Co. v. Hecht*, 95 U. S. 168, is a precedent quite in point. There the company had a charter which provided that process against the company should be served on the president in a particular manner. A subsequent act provided that process against corporations might, in certain contingencies, be served on the clerk of the company. The process in the case was served on the clerk, and the company contended that that service was illegal, for the reason that the later act impaired the contract in the company's charter. The court held the service to be good, and that a statute which prescribed a mode of service on a corporation, different from that provided for in a charter previously granted to a particular company, did not impair the obligation of the contract between such company and the State. The State

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may, without violating this constitutional provision, change the mode of taking lands, transfer the duty of assessing the damages from one tribunal to another, give a right of appeal, and extend the time within which claims for damages may be made. *Pierce Railroads*, 451.

Without adverting to the line of cases which discuss the right of the State to exercise governmental and police powers over corporations having irrepealable charters, enough has been said to show that the statute in question was a valid exercise of legislative power as applied to this company's charter.

The appeal was improperly taken to the Common Pleas, and should have been dismissed.

KENDALL V. CITY COUNCIL OF CAMDEN.

(47 N. J. Law, 64.)

Municipal corporation — seating members of council.

A city council, having exclusive power to judge of the election and qualifications of its members, having once seated a member after an investigation, cannot order a second investigation.*

CERTIORARI to review proceedings of a common council in regard to election of a councilman. The opinion states the point.

C. T. Reed, for prosecutor.

J. Willard Morgan, for defendants.

SCUDDER, J. By the charter of the city of Camden, Pamph. Laws of 1871, 224, § 26, the city council "shall be the sole judge of the election returns and qualifications of its own members, and keep a journal of its own proceedings." This section constitutes the council both a board of canvassers to inspect the returns of the election boards, and also a tribunal, that on a sufficient showing of probable fraud or irregularity, may order a recount of votes, hear evidence applicable to the points in dispute, and determine who is entitled to be seated as a member. *State v. Rahway*, 4 Vroom, 111.

* To same effect, *Coogan v. Barbour*, Conn. Sup. Ct.

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But this council, like all other special statutory tribunals, is subject to the supervisory jurisdiction of this court when it departs from or exceeds the express terms of the power given in the charter. It was a mistake made in the argument of counsel when he claimed the same exclusive authority for a city council having a charter like this as that exercised by Congress or the legislatures of our States. They are co-ordinate branches of the government under the Constitution, and cannot be controlled by the judiciary in the discharge of their appropriate functions. The Constitution has divided the powers of government into distinct departments, and cautiously provided for their independent exercise. It has expressly forbidden any person belonging to or constituting one of these departments from exercising any of the powers properly belonging to either of the others, except as expressly provided in the Constitution itself. These are the words of the court in *State v. Governor*, 1 Dutcher, 331. But municipal bodies have only such powers as are given them by the legislature, and in the exercise of these, have not the independent authority to act without control by the court which belongs to the legislative branch of State government. How far they will be controlled in the exercise of this particular power given to a common council, to judge of the election and qualification of its members, it is said, depends on the exact language in which the provision is couched, viewed in the light of the general laws of the State on the subjects of contested elections and *quo warranto*. 1 Dill. Mun. Corp., § 202. It may constitute a cumulative or primary tribunal merely, or it may have the provision that council shall have the sole or final power of deciding elections. But whatever may be the extent or limitation of the authority given, it is the province of this court to see that no arbitrary act is done, under the guise of legislative sanction, to deprive citizens of their right of representation, or to unseat a candidate who, by the power and final tribunal, has been adjudged to be duly elected. Giving therefore to these words of the charter all that is claimed for them, that they constitute the council the sole and final judge of this election, the question, beyond that, presented in this case is whether, having once decided that a member has been regularly elected, under the ordinary proceedings for trying this issue, the common council of Camden may again put him on trial, not only once, but as often as changes occur in the membership which will render it easy, by personal or partisan preference,

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to substitute his opponent. It may be that in this case, as appears by the depositions of the contestant and of the two minority members of the committee, that he was refused a recounting of the ballots by the action of a majority of the committee, and that this was caused by their political hostility, but the committee reported to the council that in their judgment he showed no good cause for a recounting, and after hearing the report was accepted, and Kendall was seated and adjudged to be elected.

It is still further insisted, that admitting the power of council thus to act, it was subject to the right of reconsideration, and that like all deliberative assemblies, the common council had this right. The case of *State v. Foster*, 7 N. J. L. 101, cited as an authority for this position, sufficiently illustrates it. In joint meeting of the legislature, on a vote for a clerk of the Court of Common Pleas, one candidate had a majority of the ballots cast; before the result was announced, another balloting was ordered by the joint meeting, with a different result, electing another person. It was on *quo warranto* decided that the meeting had the right to reconsider as often as they thought proper, during the session, and it was the result only that would be considered as their final action. In *Lantz v. Hightstown*, 46 N. J. L. 102, 107, it was said that a common council cannot review its action, in granting license, at a subsequent meeting, where there is no reconsideration of that action during the session, on the ground that there was error in law or fact, unless the power of revocation is conferred by the legislature. In the present case the common council took no proceedings to reconsider or change their action until a year after their decision had been given; and when nine new members were introduced, with the hope of a better result, the former contestant renewed his protest. The impolicy of permitting such efforts to unseat members of a municipal body when the election of new members makes it feasible, because of the increased bitterness of partisan strife and personal feeling, that must be excited, makes it desirable that some remedy shall be found, if possible to prevent them. It does not seem to me to be difficult in this case to indicate the remedy and the reasons for it. The resolution of the council, appointing a committee to investigate again the right of the present incumbent, Kendall, to his seat is not a mere attempt at reconsideration, by a legislative body, of its own action, but it is in effect an appeal to another tribunal composed of different members. The true construction

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of the clause in the charter making the common council the sole judge of the election and qualifications of its members does not call for such appeal, but makes the one adjudication final as to themselves and to their successors in office. In *Hadley v. Mayor, etc., of Albany*, 33 N. Y. 603, the common council having canvassed the returns and determined and declared the result in an election of mayor of the city, and made another canvass at a subsequent day with a different result, the court said, that having once legally performed the duty imposed, the power of the council was exhausted, and they had no right to reverse their former decision by making a different determination. A like ruling is found in *Morgan v. Quackenbush*, 22 Barb. 72, 78. Whether acting as canvassers of returns or as a special tribunal to examine the whole subject of the election by going behind the returns and determining who has been legally elected by the ballots cast, a common council, having once examined and decided the question, can take no step further to reverse its action at a subsequent meeting, and certainly not when after the lapse of a year, new members have been brought in to change its form and opinion.

However worthy of condemnation the action of the former council may have been in refusing the recount, if good cause were shown, and there does appear some ground for suspecting that they were actuated by prejudice rather than a fair judgment, there is no power found in the charter to review and correct their determination. The resolution passed March 14, 1884, appointing a committee to investigate the former contestant's petition and claim to the seat of the prosecutor in council, is *ultra vires* and void. It necessarily subjects the incumbent to loss and expense in preparing his defense, and not to a mere contingent injury depending on the result of the investigation. It is an oppressive act, attempted by a municipal body beyond its corporate power, involving pecuniary loss to the prosecutor, and he need not wait therefore until there is a final order or judgment in the case, but may stop it at its inception by a writ of *certiorari*.

The resolution and all proceedings under it are set aside without costs.

Judgment remanded.

Condon v. Barr

CONDON V. BARR.

(47 N. J. Law, 112.)

Landlord and tenant — holding over — demand of rent.

A demand of rent by a landlord of a tenant holding over does not convert the tenancy into one from year to year.

DISPOSSESSION proceedings. The opinion states the case.

Woodbridge Strong & Sons, for plaintiff.

KNAPP, J. The writ in this case brings proceedings dispossessing a tenant under the landlord and tenant act. Points are raised touching the jurisdiction of the justice who tried the cause; also the validity of the judgment rendered.

The first reason for reversal assigned is that the affidavit filed with the justice shows a tenancy from month to month, not terminated by legal notice. The affidavit sets forth that the claimant let and rented the premises claimed, in November, 1882, to the tenant for the term of one month, at the rent of \$10, to be paid in advance. The tenancy described terminated by efflux of time without notice after the month expired for which the premises were rented. The tenant was in thereafter by sufferance, and although he remained in possession for two years paying no rent, his possession was a continued wrong-doing unless the landlord gave to it his consent, manifested by some act or declaration proving or tending to prove such a state of mind. *Decker v. Adams* 12 N. J. L. 99; *Moore v. Moore*, 41 N. J. L. 515.

It is said that the *status* of the tenant has been changed by such consent of the landlord, so that he now holds possession by such tenure as could be terminated only by notice, and that this appears in the affidavit filed with the justice. The affidavit had annexed to it the following notice which was served upon the tenant September 3, 1884: "You are hereby notified to pay to me the sum of \$220, rent due me for the use of the house and lot rented by you of me and now occupied by you, situated on the south side of City alley, near Somerset street, New Brunswick, New Jersey, and you are required to pay said rent in three days from the date of service or to deliver possession of said premises to me."

The question here is whether the fact of such notice being served upon one holding over after a definite term has ended proves unequivocally his assent to the continuance of the tenant in possession, so as to convert the estate at sufferance to a tenancy at will or from year to year. The receipt of rent by the landlord from one so holding over, or distraining for it, indicates with certainty a design to continue the relation of landlord and tenant, and a tenancy from year to year or at will may arise. Following a letting for a month, the tenancy would be from month to month, and notice for a month in such case would be required to determine the term. *Steffens v. Earl*, 40 N. J. L. 128; s. c., 29 Am. Rep. 214.

Other circumstances have been taken as evidence of more or less strength in determining this question which is one of fact. But it is the consent of the parties, express or implied, to create a new tenancy which is to be sought after in the circumstances which are appealed to to convert the wrong-doer into a lawful holder. The notice referred to above was not essential, nor is it relied upon in this case as necessary to the claimant's right to recover possession, but it is in the affidavit, and if it discloses the fact of consent so clearly that we must regard it as established here, then the affidavit should further have disclosed notice to terminate the uncertain tenancy in order to give the justice jurisdiction. The notice produced on the trial of the cause undoubtedly would have been competent evidence before the justice on the question of consent, but that it in itself contained such proof of the fact as to overturn the theory upon which the claimant proceeded, namely, as against a tenant holding over, I am unwilling to admit. No one doubts that had the proceedings been instituted at any time before service of such notice the tenant must have been ousted as a wrong-doer.

At common law one in by sufferance through the laches of the landlord was not liable for rent. The demand was for rent at the rate agreed for the month of leasing. It certainly could not without the assent of him who was in possession, bind him to a continuance of the terms of the original lease. Doubtless it was an option given to him to pay his long arrears and continue the tenancy, but he did not accept it and I do not think we are to conclude as matter of law, that the landlord, by that rejected offer, has put it in the power of the wrong-doer to say he is now a tenant, and thereby further postpone the landlord's right of re-entry. After two years' possession of the defendant's property without any

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remuneration the owner says to the trespasser, "Pay me or go out." He does neither, but asserts that in law this shows the intention of the landlord to condone his wrong and give him lawful tenure for an indefinite term. It may be evidence which the justice might consider under a plea of consent to his possession but neither there nor here is it by any means conclusive of the fact.

[Minor matters omitted.]

The judgment of the justice that the costs be levied of the goods and chattels of any person or persons in possession was irregular and wrong, but it is severable from the other part of the judgment, and it may be reversed as to that. But the rest of the judgment is affirmed, with costs.

Judgment affirmed.

NEW YORK, LAKE ERIE AND WESTERN RAILWAY COMPANY V.
HARING.

(47 N. J. Law, 187.)

Corporation — tort — ultra vires.

SUFFICIENTLY reported, 52 Am. Rep. 328.

FRECH V. YAWGER.

(47 N. J. Law, 187.)

Negotiable instrument — signing after maturity.

After a note had fallen due, the defendants signed it under the maker, to induce the payee to hold it and extend the time of payment. *Held*, that they were liable.

ERROR to the Supreme Court. Action on a note. The opinion states the case. The plaintiff had judgment below.

J. A. Frech and A. A. Clark, for plaintiffs in error.

H. A. Fluck, for defendant in error.

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REED, J. This writ brings up a judgment upon a verdict taken in the Hunterdon Circuit. The action was against the plaintiffs in error upon a note, of which the following is a copy:

“OLINTON, *April* 16, 1862.

“Six months after date I promise to pay Wm. H. Yawger, or bearer, the sum of two hundred dollars, without defalcation or discount, for value received, with interest from date.

“GEORGE M. FRECH,

“JNO. A. FRECH,

“GEO. M. FRECH, Jr.”

It appeared at the trial that the note was originally signed by George M. Frech. About April 1, 1880, the names of the plaintiffs in error, John A. and George M. Frech, Jr., were by them signed thereto. Both George M. Frech, the maker, and William M. Yawger, the payee, are dead. At the close of the plaintiff's case, a nonsuit was moved and refused. Error is assigned upon the exception sealed to this ruling. The contention now is that the defendants below were not fixed with a liability to pay the said note by any thing appearing in the testimony delivered in the cause. It is insisted that there was a failure to show, first, that there was any consideration moving to them for their signatures, and secondly, that their contract was evidenced by no writing which would satisfy the statute of frauds.

In regard to the first objection it is sufficient to remark that the evidence relative to the consideration is sufficient for the jury to have drawn a conclusion therefrom that the signing of the note by the plaintiffs in error was induced by a promise on the part of the payee and holder of the note to retain the same in his own hands, and to give further time to the maker. Either of these was a sufficient consideration to support the contract entered into by John and George Frech.

It is secondly insisted that the contract of these parties was a guaranty of the debt of their father, and that the fact that they wrote their names underneath the name of the maker, long after the execution and maturity of the note, is not a written guaranty. Had the names of the plaintiff in error been signed to the paper before maturity it could with no reason be pretended that they did not enter into a clearly defined written contract to pay money at a

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certain time. But it is said that from the fact of its appearing, that at the time of the signature the note had already matured, it appears that their promise, so far as it was evidenced by the writing itself, was to pay at an impossible time. It is no objection to the validity of a note that it has no time of payment mentioned. It is payable on demand. *Thompson v. Ketcham*, 8 Johns. 189; s. c., 5 Am. Dec. 332; *Whillock v. Underwood*, 2 B. & C. 157; *Piner v. Clary*, 17 B. Monr. 663.

The negotiation of a note after maturity is equivalent to the issuance of a note payable on demand. This is the extent of an indorser's liability who places his name upon paper after maturity. *Berry v. Robinson*, 9 Johns. 121; *Bishop v. Dexter*, 2 Conn. 419; *Patterson v. Todd*, 18 Penn. St. 426; Chitty Bills, § 216. And from all analogous instances of the signing of commercial paper after maturity, the contract of these parties must be esteemed as the execution of a note payable upon demand.

But it may be said that this effect of the signature is the result of the application of the usages peculiar to the law merchant and is not the written expression of the parties, and so does not amount to a writing within the purview of the statute of frauds. If however it be admitted that this construction of the contract into which these parties entered is the result of the application of the principles of the law merchant, and is not merely the construction which is always given to any agreement to do an act where none or a past date is mentioned, yet this admission does not aid the plaintiffs in error. For it cannot be doubted that to the class of collateral agreements, in which by the law merchant a signature, from its position and surrounding circumstances, implies a completed contract, the statute of frauds does not apply.

Thus Chitty, speaking of bills, remarks that this security is in some respects preferable to many others of a more formal nature. For says he, each of the parties to a bill, by merely writing his name upon it as drawer, acceptor or indorser, thereby guarantees the due payment of it at maturity, and the consideration in respect of which he became a party to it can rarely be inquired into; whereas in the case of an ordinary guaranty, the statute against frauds requires the consideration to be expressed, and other matters of form which frequently render an intended guaranty wholly inoperative.

So Mr. Throop, in speaking upon this subject, observes that it

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is well settled that in the absence of a statute requiring an acceptance of a bill of exchange to be in writing, a verbal acceptance will bind the cases so holding ignoring altogether the statute of frauds. Many other still more unequivocal instances of liabilities created by the mercantile law, which are daily enforced by the courts in direct conflict with the provisions of the statute of frauds, may be suggested. For instance, that of an accommodation indorser particularly of an unaccepted bill of exchange. Throop *Validity of Verbal Agreements*, § 6.

The following authorities are grounded obviously on the non-applicability of the statute to contracts which arise by the usages of the law merchant : 2 Dan. Neg. Inst. 777 ; *Leonard v. Mason*, 1 Wend. 521 ; *Oakley v. Boorman*, 21 Wend. 588 ; *Spaulding v. Andrews*, 48 Penn. St. 411, and other cases cited by Mr. Throop at section 86 of his work.

In any aspect in which the liability of the plaintiffs in error can be viewed, I think there was a case for the jury, and the action of the trial justice in refusing to nonsuit was correct.

Judgment should be affirmed.

Judgment affirmed.

For affirmance — The CHANCELLOR, DEPUE, KNAPP, MAGIE, REED, SCUDDER, VAN SYKEL, BROWN, COLE, WHITAKER.

For reversal — DIXON, PARKER, PATERSON.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY V. STEINBRENNER.

(47 N. J. Law, 161.)

Negligence — imputable — master and servant.

Where a passenger, by a coach hired with the driver for a particular journey, is injured by a collision with a railroad train, caused by the concurring negligence of the company and the driver, the negligence of the driver is not to be imputed to the passenger. (*See note, p. 185.*)

ERROR to the Supreme Court. Action for personal injury by negligence. The opinion states the case. The defendant had judgment below.

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C. Parker, for plaintiff in error.

Vredenburg & Garretson, contra.

DEPUTY, J. The exception taken to the refusal to nonsuit presents the same questions that are raised by the exceptions to the charge and the refusals to charge. The defendant's counsel requested the court to instruct the jury that there was negligence on the part both of the plaintiff and of the driver of the coach, contributing to the accident, which would preclude the plaintiff from a recovery. The judge charged that if the plaintiff himself was negligent and his negligence contributed to the injury, there could be no recovery. He refused to charge, as a question of law, that there was such contributory negligence on the plaintiff's part apparent in the case as would prevent the plaintiff from maintaining his action. This ruling was correct; for where it is a fairly debatable question upon the evidence, whether there was negligence in the plaintiff which contributed to the injury, the question is one for the jury. The court cannot decide that proposition as a question of law unless the plaintiff's contributory negligence clearly appears. *Penn. R. Co. v. Matthews*, 36 N. J. L. 531; *Del., Lack. & Western R. Co. v. Toffey*, 38 N. J. L. 525; *Penn. R. Co. v. Richter*, 45 N. J. L. 180. The testimony on that subject was not such that the judge could say that there was contributory negligence as a legal inference from undisputed facts.

The judge also refused to charge that the negligence of the driver of the coach was imputable to the plaintiff, and did not submit the question of the driver's negligence to the jury. This judicial action was based upon the theory that the driver was neither the servant of the plaintiff, nor was the latter in law so identified with the driver that the driver's negligence would prevent the plaintiff's recovering for injuries received from the defendant's negligence.

It is clear that the plaintiff and the driver of the coach did not hold to each other the relation of master and servant. *Quarman v. Burnett*, 6 M. & W. 499, is directly upon that point. This subject came before the English courts in the earlier case of *Laugher v. Pointer*, 5 B. & C. 547. In that case the owner of a carriage, having occasion to use it, hired of a stable-keeper a pair of horses to draw it, the stable-keeper furnishing the driver. The driver,

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by negligent conduct in driving the carriage, ran against and injured a horse belonging to a third person. The latter sued the owner of the carriage for the injury. At the trial ABBOTT, C. J., nonsuited the plaintiff, and the nonsuit was sustained *in banc* by an equally-divided court, ABBOTT, C. J., and LITTLEDALE, J., holding the nonsuit to be right; BAILY and HOLROYD, JJ., dissenting.

In *Laugher v. Pointer* all the judges agreed that the defendant's liability for the negligent acts of the driver could arise only from the relation of master and servant, and the dissenting judges placed their opinions on the ground that the defendant had assumed that relation. Finally the question was set at rest by *Quarman v. Burnett*. In that case the defendants kept a carriage and were accustomed to hire horses and a coachman of a job mistress for a day or a drive, for which the job mistress charged and received a certain sum. The defendants generally had the same horses and always the same coachman. The coachman was regularly in the employ of the job mistress and received from her regular weekly wages. The defendants paid him two shillings for each drive as a gratuity, and had provided a livery hat and a coachman's coat, which he wore when driving for them and took off on his return to the defendant's house, where the hat and coat were hung up in the passage. He had driven the defendants out one day and on his return, after the defendants alighted from the carriage, he left the horses and carriage unattended, to go into the defendants' house to leave the livery hat. The horses set off whilst the driver was so occupied, and ran against the plaintiff's chaise, threw him out and seriously injured him, and damaged the chaise. In a suit against the owners of the carriage for these injuries, the plaintiff had a verdict, which was set aside for the reason that the driver was not the servant of the defendants but was the servant of the job mistress, and that the latter alone was responsible for his negligent acts.

Quarman v. Burnett was decided very much upon the reasoning of ABBOTT, C. J., and LITTLEDALE, J., in *Laugher v. Pointer*, and has been regarded as settling the law in the English courts, that the hiring of horses to be driven by a driver regularly in the employ of the person from whom the horses are hired does not create the relation of master and servant between the hirer and driver, from which a liability for the driver's negligence would

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arise. In the latest case in the English courts, in which the subject was considered, *Quarman v. Burnett* was approved and followed. *Jones v. Corporation of Liverpool*, 14 Q. B. Div. 890.

But it is contended by the plaintiff in error that although the hiring of a coach and driver for a journey would not create the relation of master and servant, so as to make the hirer responsible to third persons in an action for an injury caused by the negligent conduct of the driver, yet the hirer of the coach is so identified with the driver in the prosecution of the journey that the latter's negligence will be imputed to the hirer as contributory negligence to bar him from the right of suit against third persons for injuries sustained by their negligence. To maintain this contention *Thorogood v. Bryan*, 8 C. B. 114, is relied on.

In *Thorogood v. Bryan*, the deceased, for causing whose death the suit was brought, was a passenger in an omnibus owned by one B. The defendant was the owner of another omnibus running on the same line. The deceased, while alighting from the omnibus in which he was a passenger, was knocked down by the defendant's omnibus, and received injuries from which his death ensued. The court sustained an instruction to the jury that if the want of care on the part of the driver in which the deceased was a passenger, in not drawing up to the curb to put the deceased down, had been conducive to the injury, the plaintiff could not recover, although the defendant's driver had been guilty of negligence. The grounds of this decision appear in the opinions of Justices COLTMAN and MAUL. COLTMAN J., said, "that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it." MAUL, J., expressed the same idea in this language: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance; he enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him; if he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. * * * As regards the present defendant, he is not altogether without fault. He chose his own conveyance and must take the consequences of any default of the driver whom he thought fit to trust."

It will be observed from the reasoning of the judges in *Thorogood*

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v. *Bryan* that the decision was not placed upon the control the passenger had or might have had over the driver's conduct in driving the omnibus, but was rested upon his selection of the vehicle in which he chose to ride; and the decision applies as well to passengers in public conveyances, where interference with the driver's management of his team, if not resented, would be likely to be futile, and passengers in railroad trains, where the passenger is absolutely without power to control the running of the trains, as to a passenger by a private conveyance hired for a special occasion. The Court of Exchequer, in the only case I have found in the English courts in which *Thorogood v. Bryan* was applied, gave effect to the doctrine of that case as against a passenger on a railway train who was injured in a collision between trains of different companies through the negligence of the drivers of both trains. *Armstrong v. Lancashire and Yorkshire R. Co.*, L. R., 10 Exch. 47.

Thorogood v. Bryan has been directly repudiated in the English Court of Admiralty (*The Milan*, Lush. Adm. 388, 41 L. J. [P., M. & A.] 105; *Chartered Mercantile Bank v. Netherlands, etc.*, Nav. Co., 9 Q. B. Div. 118; s. c., on appeal, 10 Q. B. Div. 521, 545), and is generally cited in common-law courts simply as a case that has not been overruled. It was so cited in *Armstrong v. Lancashire and Yorkshire R. Co.*, and although both the barons disclaimed any dissatisfaction with the case, POLLOCK, B., made the observation that "the only difficulty in it arises from the use of the word 'identified' in the judgment. If it is to be taken that by the word 'identified' is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition, which could not be entirely sustained. What I understand it to mean is that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus, or the driver." This comment of the learned baron seems to me to be hostile to the reasoning in *Thorogood v. Bryan*, for that decision was placed expressly on the ground that by selecting the conveyance the passenger had so identified himself with the driver that he must be considered a party to the driver's negligence, a legal sequence that could arise only from the identification being such as that *quoad hoc* the driver became the agent of the passenger; for the contributory negligence which shall defeat the action must in some sense be the act of the party injured.

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Palmier v. Erie R. Co., 34 N. J. L. 151. The substitution of the words "in the same position" for "identified," implies that the theory of the doctrine is that a person doing a lawful act may, without any fault on his part, either personally or imputable to him as being the act of his agent, be placed in a position in which he will be debarred from recovering for an injury received from the wrongful act of a third person, a proposition wholly at variance with legal principles. A party may, by his act, be in the position in which he receives an injury, and yet not be deprived of his right of suit against a wrong-doer. A person sustaining an injury from the negligence of another is precluded from his action on the ground of contributory negligence only where there has been some fault on his part which was the proximate cause of the injury. "Nothing will preclude him from recovering but such conduct as puts him in the wrong." 2 Thomp. Neg. 1154; *N. J. Express Co. v. Nichols*, 33 N. J. L. 435, 439.

Tested either by the reasoning of the judges by whom *Thorogood v. Bryan* was decided, or by the explanation of Baron POLLOCK in *Armstrong v. Lancashire and Yorkshire R. Co.*, the doctrine of that case is equally untenable. The decision has not escaped criticism, nor has it passed in the English common-law courts without indications of distrust, if not disapproval. It was cited by counsel in *Wait v. N. E. R. Co.*, E. B. & E. 719, and both in the Queen's Bench and in the Exchequer Chamber the court declined to express any opinion upon it, and decided the case on other grounds. It was criticised and strongly condemned by Messrs. Keating and Willis (afterward judges of the Court of Common Pleas), in the notes to *Ashby v. White*, 1 Sm. Lead. Cas. [*342] 505, and the criticism has been referred to by English judges, if not with approval, at least without expression of dissent therefrom. *Taff v. Warman*, 2 C. B. (N. S.) 750; *Wait v. N. E. R. Co.*, E. B. & E. 728; *Spaight v. Tedcastle*, 6 App. Cas. 217. And this criticism is placed by Mr. Addison in the text of his work on Torts. Add. Torts, 374. Mr. Bigelow concludes a review of the cases, including *Thorogood v. Bryan*, with the expression of his opinion that "the only case where the so-called doctrine of identification or imputation can be applied is where the passenger actually participates in the carrier's fault, as by urging him on or by plainly manifesting approval of his course, and thus encouraging it." Big. Lead. Cas. 726-729.

Thorogood v. Bryan has met both with approval and disapproval

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in the courts of this country. It was expressly repudiated by the Supreme Court of this State in *Bennett v. N. J. R. Co.*, 36 N. J. L. 225; s. c., 13 Am. Rep. 435. In that case a passenger in a horse-car, who was injured by a collision between a train of the defendant and the horse-car, sued the railroad company, and it was held that the driver of the horse-car was not the agent of the passenger so as to render the passenger chargeable with the negligence of the driver. The chief justice, in delivering the opinion of the court, commenting on *Thorogood v. Bryan*, said: "This case stands, I think, in point of principle, alone in the line of English decisions, and the grounds upon which it rests seem to me inconsistent with legal rules. The reason given for the judgment is that the passenger in the omnibus 'must be considered as identified with the driver of the omnibus in which he voluntarily becomes a passenger,' and that the negligence of the driver is the negligence of the passenger, but I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified in a legal sense with the driver of such conveyance. Such identification could result only in one way, that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded." The chief justice adds: "It is obvious that in a suit against the proprietor of the car in which he was a passenger there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. * * * The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single purpose of preventing the passenger from bringing a suit against a third party whose negligence has co-operated with that of the driver in the production of the injury. I am compelled to dissent from such a proposition."

Callahan v. Sharp, 27 Hun, 85, was also cited as a case in point adverse to the ruling of the court below. In that case the suit was brought on the statute to recover damages for causing the death of a child thirteen years old. The facts were that the mother of the child hired a coach and driver from a livery-stable to carry her and her children to a funeral. The coach, in crossing the defendant's railroad, came in collision with a passing train, causing the death of one of the children. It was held by DYKEMAN and GILBERT, JJ. (BARNARD, P. J., dissenting), that as the driver of the coach was subject to the control and commands of the mother, his negli-

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gence was imputable to her, and that as the mother and children were engaged in a joint enterprise, in which she acted for herself and them, the negligence so imputed to her might be attributed to deceased, and prevented a recovery by his representatives. But it appears from a note in Abbott An. Dig. for 1882-3, p. 344. § 94, that the suit was tried a second time on the theory of the reversing opinion in 27 Hun, and that the judgment in the second suit upon the same facts was in turn reversed by the same court (CULLEN, J., and BARNARD, P. J., concurring, and DYKEMAN, J., dissenting), on the ground that the deceased was not chargeable with the driver's negligence because the driver was the employee of the stable-keeper, and not under the mother's control in the management of the team, and because if it were otherwise, the deceased, being an infant of tender years, was *sui juris*. On appeal, this last decision was affirmed by the Court of Appeals without an opinion. *Callahan v. Sharp*, 95 N. Y. 672. The final result in this case seems to be adverse to the contention of the plaintiff in error. and prior decisions of the same court are to the same effect. *Chapman v. N. H. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & H. R. Co.*, 20 N. Y. 492; *Webster v. H. R. Co.*, 38 N. Y. 260; *Robinson v. N. Y. C. R. Co.*, 66 N. Y. 11; s. o., 23 Am. Rep. 1.

In the principle which governs in this respect there is no distinction between a public conveyance in which a passenger takes passage and a coach hired by him from a livery for a particular journey; nor is the situation changed by the fact that the negligence of the driver is invoked simply as contributory negligence to exclude the passenger from his action against a third person for an injury resulting from the negligence of both parties. As the chief justice points out in his opinion in *Bennett v. N. J. R. Co.*, the identification of the passenger with the driver for the purpose of fixing on the former responsibility for the latter's act, can result only from considering the driver as the servant of the passenger, and the driver cannot be converted into his servant for the single purpose of preventing the passenger from bringing suit against a third party whose negligence has co-operated with that of the driver in the production of the injury. The identification must be so complete that the passenger would not only be debarred from a suit against the proprietor of the coach for the driver's negligence in the particular instance, but would also be responsible to third persons for injuries sustained by the carelessness of the driver in the course of the

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journey. *Quarman v. Burnett* and kindred cases show that the relation of master and servant is not created by such a hiring, and that such a responsibility does not arise from an employment under it. "There may," as was said by Baron PARKE in *Quarman v. Burnett*, "be special circumstances which may render the hirer of horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of, or to absent himself at one particular moment, and the like." *McLaughlin v. Pryor*, 4 M. & G. 48; s. c., 1 Car. & M. 354, is a precedent of an action successfully prosecuted against the hirer of a carriage and horses for a trespass committed by the driver, who was the servant of the man who let the carriage, the defendant's liability for the driver's act being enforced on the ground that he sat upon the box and countenanced, encouraged and assented to the driver's act, and made the latter's negligent act his own. It may also be that a passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked, whether as a cause of action for an injury done by the driver, or as contributory negligence to bar an action by the passenger against a third person for an injury sustained, the negligence, to be imputed to the passenger, must be such as arises in some manner from his own conduct. The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring. If the law were otherwise, not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be from a coach-stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the

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team, and strangers to the route over which they were to be carried.

In this case there were no special circumstances which would make the driver's negligent act the act of the plaintiff. The plaintiff hired the coach to carry himself and four nieces to a particular place. The journey was along a public road not specially dangerous except in the fact that it crossed the defendant's railroad. The coach was an ordinary closed coach, with two seats inside and a driver's box in front, and a window on each side. The plaintiff and two of his nieces occupied the back seat. The plaintiff testified that he told the driver before starting to be careful about crossing the railroad; that the driver slackened up as he approached the crossing; that he (the plaintiff) listened all the time, and made it his particular business to look and see whether any train was coming; that he did not hear any whistle or bell, or the approaching train, and was not aware of the approach of the train until it was right upon them. If the driver was negligent in venturing upon the track, the plaintiff neither encouraged his negligent act nor did he contribute to it by any negligence of his own. The judge's refusal to charge that the driver's negligence was imputable to the plaintiff was correct.

The judgment should be affirmed.

Judgment affirmea.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, MAGIE, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, PATERSON, WHITAKER.

For reversal—None.

NOTE BY THE REPORTER.—In *Little v. Hackett*, Supreme Court of the United States, January 4, 1886, it was *held*, that a person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver. The court, FIELD, J., said: "That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties, which if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the

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wrong. It would seem that the converse of the doctrine should be accepted as sound, that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrong-doer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person toward whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child or guardian and ward, and the like. Such a relation involves considerations which have no bearing upon the question before us.

“To determine therefore the correctness of the instruction of the court below — to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident he is not responsible for the driver's negligence, nor precluded thereby from recovering in the action — we have only to consider whether the relation of master and servant existed between them. Plainly that relation did not exist. The driver was the servant of his employer, the livery-stable keeper, who hired out him, with horse and carriage, and was responsible for his acts. Upon this point we have a decision of the Court of Exchequer in *Quarman v. Burnett*, 6 Mees. & W. 499. In that case it appeared that the owners of a chariot were in the habit of hiring, for a day or a drive, horses and a coachman from a job-mistress, for which she charged and received a certain sum. She paid the driver by the week, and the owners of the chariot gave him a gratuity for each day's service. On one occasion he left the horses unattended, and they ran off, and against the chaise of the plaintiff, seriously injuring him and the chaise, and he brought an action against the owners of the chariot, and obtained a verdict; but it was set aside on the ground that the coachman was the servant of the job-mistress, who was responsible for his negligence. In giving the opinion of the court, Baron PARKE said: ‘It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the negligence of the servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct; as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at any particular moment, and the like.’ As none of these circumstances existed it was held that the defendants were not liable, because the relation of master and servant between them and the driver did not exist. This doctrine was approved and applied by the Queen's Bench Division, in the recent case of *Jones v. Corporation of Liverpool*, 14 Q. B. Div. 890. The corporation owned a water-cart, and contracted with a Mrs. Dean for a horse and driver, that it might be used in watering the streets. The horse belonged to her, and the driver she employed was not under the control of the corporation otherwise than its inspector directed him what streets or portion of streets to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart,

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and in an action against the corporation for the injury, he recovered a verdict, which was set aside upon the ground that the driver was the servant of Mrs. Dean, who had hired both him and the horse to the corporation. In this country there are many decisions of courts of the highest character to the same effect, to some of which we shall presently refer

“The doctrine resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him, or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrong-doer when they who are in charge can recover; in other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they, by reason of such negligence, could not recover. The leading case to this effect is *Thorogood v. Bryan*, decided by the Court of Common Pleas in 1849. 8 C. B. 115. It there appeared that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus, running on the same line of road. Both vehicles had started together, and frequently passed each other, as either stopped to take up or set down a passenger. The deceased wishing to alight did not wait for the omnibus to draw up to the curb, but got out while it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterward died from the injuries sustained. The court, among other things, instructed the jury that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to the injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury found for the defendant, and the court discharged a rule for a new trial, for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by Mr. Justice COLTMAN, that the deceased having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the owner and her servants that if an injury resulted from their negligence, he must be considered a party to it; ‘in other words,’ to quote his language, ‘the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury.’ Mr. Justice MAULE, in the same case, said that the passenger ‘chose his own conveyance, and must take the consequences of any default of the driver he thought fit to trust.’ Mr. Justice CRESSWELL said: ‘If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to any injury from a collision, his master clearly could maintain no action, and I must confess I see no reason why a passenger who employs the driver to carry him stands in any different position.’ Mr. Justice WILLIAMS added that he was of the same opinion. He said: ‘I think the passenger must, for his purpose, be considered as identified with the person having the management of the omnibus he was conveyed in.’

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“What is meant by the passenger being ‘identified with the carriage,’ or ‘with the person having its management,’ is not very clear. In a recent case, in which the Court of Exchequer applied the same test to a passenger in a railway train which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, Baron POLLOCK said that he understood it to mean ‘that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver.’ *Armstrong v. Lancashire & Y. Ry. Co.*, L. R., 10 Exch. 47, 52; s. c., 12 Moak’s Eng. Rep. 508, note. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position, with reference to the negligent act, as the driver who committed it; or as his master, the owner. Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained. Neither has the support of any adjudged cases entitled to consideration.

“The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world. *Thorogood v. Bryan* has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded.

“In *The Milan*, Dr. LUSHINGTON, the judge of the high court of admiralty, in speaking of that case, said: ‘With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and lastly, because it is directly against *Hay v. La Neve*, 2 Shaw, 395, and the ordinary practice of the court of admiralty.’ Lush. 388, 403.

“In this country the doctrine of *Thorogood v. Bryan* has not been generally followed.

“In *Bennett v. New Jersey R. & T. Co.*, 36 N. J. Law, 325, and *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. Law, 161, it was elaborately examined by the Supreme Court and the Court of Errors of New Jersey, in opinions of marked ability and learning, and was disapproved and rejected. In the first case it was held that the driver of a horse car was not the agent of the

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passenger so as to render the passenger chargeable for the driver's negligence. The car, in crossing the track of the railroad company, was struck by its train, and the passenger was injured, and he brought an action against the company. On the trial the defendant contended that there was evidence tending to show negligence by the driver of the horse car, which was in part productive of the accident, and the presiding judge was requested to charge the jury that if this was so, the plaintiff was not entitled to recover; but the court instructed them that the carelessness of the driver would not affect the action, or bar the plaintiff's right to recover for the negligence of the defendant. And this instruction was sustained by the court. In speaking of the 'identification' of the passenger in the omnibus with the driver, mentioned in *Thorogood v. Bryson*, the court, by the chief justice, said: 'Such identification could result only in one way; that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle; and it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency; and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor of the car in which he was the passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor because if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. 36 N. J. L. 227, 228.

"In the latter case it appeared that the plaintiff had hired a coach and horses, with a driver, to take his family on a particular journey. In the course of the journey, while crossing the track of the railroad, the coach was struck by a passing train, and the plaintiff was injured. In an action brought by him against the railroad company, it was held that the relation of master and servant did not exist between him and the driver, and that the negligence of the latter, co operating with that of persons in charge of the train, which caused the accident, was not imputable to the plaintiff, as contributory negligence, to bar his action.

"In New York a similar conclusion has been reached. In *Chapman v. New Haven R. Co.*, 19 N. Y. 841, it appeared that there was a collision between the trains of two railroad companies, by which the plaintiff, a passenger in one of them, was injured. The Court of Appeals of that State held that a passenger by railroad was not so identified with the proprietors of the train conveying him, or with their servants, as to be responsible for their negligence, and that he might recover against the proprietors of another train for injuries sustained

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from a collision through their negligence, although there was such negligence in the management of the train conveying him as would have defeated an action by its owners. In giving the decision the court referred to *Thorogood v. Bryan*, and said that it could see no justice in the doctrine in connection with that case, and that to attribute to the passenger the negligence of the agents of the company, and thus bar his right to recover, was not applying any existing exception to the general rule of law, but was framing a new exception based on fiction and inconsistent with justice. The case differed from *Thorogood v. Bryan* in that the vehicle carrying the plaintiff was a railway train instead of an omnibus; but the doctrine of the English case, if sound, is as applicable to passengers on railway trains as to passengers in an omnibus; and it was so applied, as already stated by the Court of Exchequer in the recent case of *Armstrong v. Lancashire & Y. R. Co.*

" In *Dyer v. Erie Ry. Co.*, 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing, without giving the driver of the wagon any warning of its approach. The horses becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon, and was injured by the train which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and although he travelled voluntarily, he was not responsible for the negligence of the driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses.

" A similar doctrine is maintained by the courts of Ohio. In *Transfer Co. v. Kelly*, 86 Ohio St. 86; s. c., 88 Am. Rep. 558, the plaintiff, a passenger on a car owned by a street railroad company, was injured by its collision with a car of the transfer company. There was evidence tending to show that both companies were negligent, but the court held that the plaintiff, he no. being in fault, could recover against the transfer company, and that the concurrent negligence of the company on whose cars he was a passenger could not be imputed to him, so as to charge him with contributory negligence. The chief justice in delivering the opinion of the court, said. 'It seems to us that the negligence of the company, or of its servant, should not be imputed to the passenger, where such negligence contributed to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company or its servant, was the sole cause of the injury.' 'Indeed,' the chief justice added, 'it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury caused directly or proximately by the latter's negligence should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd.'

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"In the Supreme Court of Illinois the same doctrine is maintained. In the recent case of the *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; s. c., 44 Am. Rep. 791, the doctrine of *Thorogood's* case was examined and rejected; the court holding that where a passenger on a railway train is injured by the concurring negligence of servants of the company on whose train he is travelling, and of the servants of another company with whom he has not contracted, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the company on whose train he was travelling.

Similar decisions have been made in the courts of Kentucky, Michigan and California. *Danville, etc., T. Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville, etc., R. Co. v. Case*, 9 Bush, 728; *Cuddy v. Horn*, 46 Mich. 596; s. c., 41 Am. Rep. 178; *Tompkins v. Clay Street R. Co.*, 4 Pac. Rep. 1165.

"There is no distinction in principle whether the passengers be on a public conveyance, like a railroad train or an omnibus, or be on a hack hired from a public stand, in the street, for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent, so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But as we have already stated, responsibility cannot within any recognized rules of law be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it, no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. 'If the law were otherwise,' as said by Mr. Justice DEPUÉ in his elaborate opinion in the latest case in New Jersey, 'not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box, and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be from a coach-stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.' 47 N. J. Law, 171.

"In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver further than to indicate the places to which he wished him to drive. The instruction of the court below, that unless he did exercise such control, and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him, so as to bar his right of action against the defendant, was therefore correct, and the judgment must be affirmed; and it is so ordered."

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In *Gray v. Philadelphia & R. R. Co.*, U. S. Cir. Ct., N. D. N. Y., 24 Fed. Rep. 168, it was held that where a fireman on a railroad train is injured by a collision at a crossing of two roads, brought about by the concurring negligence of the engineer on his train, and of the employees of the other road, his right to recover damages for such injury from the other road will not be defeated by reason of the negligence of the engineer. WALLACE, J., said: "Although the plaintiff was a fellow-servant of the engineer, he was a subordinate, and had no control over the movements of the locomotive. If he was not guilty of any personal negligence, and did not countenance the negligent conduct of his fellow-servant, upon reason and according to the weight of authority, he ought not to be precluded from a recovery against the defendant. If he could maintain an action against his fellow-servant and the defendant jointly, he can, at his election, pursue either severally. Upon the facts found by the jury, he was no more accountable for the misconduct of the engineer than a passenger would be, or than the owner of a cargo would be for the negligent acts of the carrier whom he has employed to transport his property. If he had occupied such a relation to the transaction he could recover against either or all of the offenders whose acts contributed to his injury. *The Atlas*, 98 U. S. 302; *The Washington*, 9 Wall. 513; *The Titan*, 23 Fed. Rep. 418; *Eaton v. Boston & L. R. Co.*, 11 Allen, 500; *Webster v. Hudson R. R. Co.*, 88 N. Y. 260; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230; s. c., 13 Am. Rep. 570; *Lockhart v. Lichtenthaler*, 46 Penn. St. 151. See *Town of Albion v. Hetrick*, 90 Ind. 545; s. c., 46 Am. Rep. 230; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; s. c., 44 Am. Rep. 791; *Cuddy v. Horn*, 46 Mich. 596; s. c., 41 Am. Rep. 178.

"The defendant relies upon the English cases of *Thorogood v. Bryan*, 8 C. B. 115, and *Armstrong v. Lancashire & Y. R. Co.*, L. R., 10 Exch. 47.

"In *Thorogood v. Bryan*, it was held that the plaintiff, an ordinary passenger in an omnibus, injured by the joint negligence of the driver of the omnibus and of the defendant, must be taken to be identified with the driver of the omnibus; and if want of care on the part of the driver of the omnibus conduced to the accident, the plaintiff could not recover against the defendant. This ruling has been generally criticised, and its correctness repudiated by text-writers of authority, and is in plain conflict with the great preponderance of judicial opinion in this country. The case of *Armstrong v. Lancashire & Y. R. Co.*, was decided upon the authority of *Thorogood v. Bryan*.

"In *Robinson v. N. Y. Cent. & H. R. R. Co.*, 66 N. Y. 11; s. c., 23 Am. Rep. 1, it was held that a person who accepts an invitation to ride with another competent to control the vehicle is not chargeable with his negligence, and contributory negligence upon his part is no defense in an action against a third party for injuries resulting from a collision, and that if the plaintiff was free from negligence, although the driver might have been guilty of negligence which contributed to the injury, the action could be maintained. CHURCH, C. J., in delivering the opinion, said: "It is no excuse for the negligence of the defendant that another's negligence contributed to the injury for whose acts the plaintiff was not responsible."

"In *Dyer v. Erie R. Co.*, 71 N. Y. 228, it was held that where one travels

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in a vehicle at the invitation of the owner or driver over whom he has no control, no relationship of principal and agent exists between them, and he is not responsible for the negligence of the driver, and contributory negligence on the part of the driver is not imputable to the passenger and is no bar to a recovery against a negligent third party for injuries resulting from a collision.

"The reasoning in both of these cases proceeds from the ground that the negligence of one person is not to be imputed to another merely because both of them are engaged in a common enterprise, when the latter has no control in fact, or by reason of superior authority, over the conduct of the former. It is otherwise where they are engaged in an enterprise, the character of which presupposes conjoint management, and therefore mutual responsibility for each other's acts, as in *Beck v. East River Ferry Co.*, 6 Robt 82.

"It is not apparent how the circumstance that the persons engaged in the common enterprise are fellow-servants can qualify the application of the principle to be deduced from these cases. That circumstance is important only as it bears upon the question of the employers' responsibility to one servant for the negligence of a fellow-servant. As between themselves, the servants of a common employer are liable to each other for negligence precisely as though the relation of fellow-servant did not exist. The cases in Massachusetts holding otherwise are generally disapproved by the commentators. Shearm. & Redf. Neg., § 112; Whart. Neg., § 245; 2 Thomp. Neg. 1062; Add. Torts, 145. See also *Hinds v. Harbou*, 58 Ind. 121.

"The exemption of the employer from liability to a servant for the negligence of a fellow-servant rests upon the implied undertaking of the servant to assume the risks necessarily incident to the service in which he engages, including the risks of the negligence of his fellow-servant in discharging duties the employer cannot be expected to discharge personally. There is no reason why a third person, with whom there is no such implied undertaking, should be entitled to avail himself, as a defense to his own negligence, of the contributory negligence of a fellow-servant of the injured party any more than of the contributory negligence of a stranger. As to him, personal negligence on the part of the injured party would seem to be the only just criterion of contributory negligence.

"In the case of *Paulmier v. Erie R. Co.*, 84 N. J. Law, 151, it was held that a servant, injured by the combined negligence of his master and of a fellow-servant, could recover against the master upon the ground that the master was one of two joint wrong-doers, and as such responsible to the servant. It would follow as a corollary that it does not lie even with an employer to insist that the contributory negligence of one servant can be imputed to a fellow-servant as a defense to the employer's negligence. Certainly a stranger cannot occupy any better position than the employer.

"There are two adjudications in this State opposed to the doctrine of *Armstrong v. Lancashire & Y. R. Co.*; *Perry v. Lansing*, 17 Hun, 84; *Busch v. Buffalo Creek R. Co.*, 20 Hun, 112. In both of these cases it was held that a defendant whose negligence contributed to the injury of an employee could not escape liability because the negligence of a co-employee of the plaintiff also concurred. This is believed to be sound law."

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In *St. Clair St. Ry. Co. v. Eadie*, 43 Ohio St. 91, a girl of sixteen, capable of taking reasonable care of herself, riding with her father who was driving his own horse and wagon, was injured by collision between the wagon and a street-car of the defendant, caused solely by the concurrent negligence of the company and her father. *Held*, that she might recover of the company. The court said, citing *Transfer Co. v. Kelly*, 36 Ohio St. 86; s. c., 38 Am. Rep. 558. "In that case, as in this, the plaintiff was not in fault; but there, as here, it was contended that the plaintiff was so identified with or related to the railroad company by the contract of carriage that the fault of the carrier must be imputed to the passenger. Neither in that case nor in this was there any fault alleged against plaintiff for becoming a passenger. The two cases differ in two respects only. There the carriage was by a public carrier, personally for hire or reward, while here it was by private conveyance, and presumably gratuitous. There the driver of the street car was a stranger to the passenger, while he was her father, with whom she was riding home. In that case it was held that the driver in the street car was in no just sense the agent or servant of the passenger. If the driver had been under the control of the passenger, then it was said there might be some show of reason for holding the passenger liable for the negligence of the driver. But as there was no such power or direction or control, the negligence of the driver of the car could not be imputed to the passenger. That was held to be a case of joint negligence of the railroad company and the transfer company, for which they might be sued jointly or severally. After a thorough examination of the numerous and conflicting authorities upon this point, some of which are cited in the opinion, we then declined to follow the case of *Thorogood v. Bryan*, 8 C. B. 115, and other like cases, which hold the passenger liable for the contributory negligence of his driver, where there was mutual fault of two drivers causing an injury, and as before stated, held that upon principle, as well as upon the better authorities, the passenger was not so identified with the vehicle in which he was riding as to make him responsible for the driver's fault. It was held by us that the passenger in that street car was not responsible for the negligence of the driver; that the latter was in no just sense the agent of the former, and had no control of, or direction over the management of the vehicle in which he was riding, so as to identify driver and passenger. The opposite doctrine, though supported by high authority, has not been received even in England with approbation. We cite a few of the cases and text-books touching this vexed question, but since the subject was fully considered in *Transfer Co. v. Kelly*, *supra*, we need not further consider it. See *Armstrong v. Lancashire Railway Co.*, L. R., 10 Exch. 47; *Waite v. N. E. R.*, El., Bl. & El. 719 (a case of a child too young to take care of itself); *Lockhart v. Lichten-thaler*, 46 Penn. St. 151; *Thomps. Carr. Pass.*, ch 7, where all the cases *pro* and *con* are cited, notes, p. 284; *Bennett v. N. J. R.*, 36 N. J. L. 225; s. c., 13 Am. Rep. 435; 1 Smith's Lead. Cases (8th Am. ed.), p. 505, *815; *Danville Turnpike Co. v. Stewart*, 2 Metc. (Ky.) 119; *Chapman v. N. H. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. H. R. Co.*, 20 N. Y. 492; *Louisville, etc., R. v. Case's Adm'r*, 9 Bush, 728; Whart. Neg., § 395; *Webster v. H. R. R. Co.*, 38 N. Y. 260. The foregoing cases mostly relate to passengers by public carriers,

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and when the passenger is injured by the negligence of another public carrier, or of a third person. It only remains to determine if a like rule applies when the plaintiff was a passenger in a private conveyance. We think it does. The plaintiff in the case at bar was in no just sense the master, nor was her father her agent or under her control or direction. In *Puterbaugh v. Reasor*, 9 Ohio St. 484, the want of ordinary care of plaintiff's agent prevented his recovery, when the agent's negligence directly contributed to the injury, though the defendant was also guilty. But it is well settled that passengers in a public conveyance are not so liable for the negligence of the employees of the carrier, because they are not the agents of the passenger. The same reasons apply with equal force to a private carrier. Plaintiff's relations to her father being that of a passenger in his wagon, going to their common home, did not, in law, make him her servant or agent, and as such responsible for his misconduct. If he had brought an action for the loss of services of his daughter, caused by this injury, his contributory negligence would defeat a recovery, nor could he recover for his own injuries for the same reason. This is because he was guilty with the defendant of causing the collision. Neither does the fact that she was the daughter defeat her rights. If her father's misconduct or negligence contributed to the injury, why should that fact exonerate a joint wrongdoer? *Robinson v. N. Y. Cent. R.*, 66 N. Y. 11; s. c., 28 Am. Rep. 1, was the case of a female who had accepted an invitation to ride with a gentleman, who was the owner and driver of a buggy in which they were riding when she was injured through the joint negligence of her driver and a train of cars. CHURCH, C. J., says: 'I am unable to find any legal principle upon which to impute to plaintiff the negligence of the driver. * * * The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach, or even a train of cars, providing there was no negligence on account of the character or condition of the driver or the safety of the vehicle, or otherwise. It is no excuse for the negligence of defendant that another person's negligence contributed to the injury for whose acts the plaintiff was not responsible.' We think this reasoning unanswerable, notwithstanding the adverse criticism and contrary holding in *Prideaux v. City of Mineral Point*, 48 Wis. 514; s. c., 28 Am. Rep. 558."

To same effect, *Cuddy v. Horn*, 46 Mich. 596; s. c., 41 Am. Rep. 178; *Town of Albion v. Hetrick*, 90 Ind. 545; s. c., 46 Am. Rep. 280; *Wabash, etc., Ry. Co. v. Shacklet*, 105 Ill. 864; s. c., 44 Am. Rep. 791; *Masterson v. N. Y. Cent., etc., R. Co.*, 84 N. Y. 247; s. c., 38 Am. Rep. 510, and note 514; also notes, 28 Am. Rep. 4.

McCULLOCH V. HOPPER.

(47 N. J. Law, 189.)

Statute of limitations — computing time.

In computing time under the statute of limitations, the day on which the cause of action accrued is excluded. (See note, p. 147.)

THE head-note states the point.

H. K. Coddington, for plaintiff.

R. I. Hopper, for defendants.

DIXON, J. The main question in this case is, whether in computing the six years within which an action for money had and received must be brought, the day on which the money came to the defendant's hand should be counted. The money having been received on June 6, 1878, and the suit begun on June 6, 1884, is the statute of limitations a bar?

The exact six years, of course, ended at the moment on June 6, 1884, corresponding to the moment on June 6, 1878, when the cause of action accrued, but the inconvenience of the thing precludes inquiry as to when that moment was. The law concedes or withholds the entire day, and *de minimis non curat*.

The rule laid down in the older authorities for the computation of time is that when the time starts from an event the day of its occurrence shall be counted; for a part of the day is certainly included, and that is reckoned as a whole day, since "the law doth reject all divisions of a day for the uncertainty;" but when the time starts from a day, that day shall not be counted, for the very words exclude it all. *Clayton's case*, 5 Rep. 1; *King v. Adderley*, Doug. 463; *Castle v. Burditt*, 3 T. R. 623; *Glassington v. Rawlins*, 8 East, 407.

The more recent decisions however disapprove the first branch of this rule, and hold that generally, in computing a period of time from an event, the day of the occurrence should not be included. Sir WILLIAM GRANT, in *Lester v. Garland*, 15 Vesey, 248, giving this reason: "Our law rejects fractions of a day. The effect is to render the day a sort of indivisible point, so that any act done in the

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compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive, and therefore the act cannot properly be said to be passed until the day is passed." *Mercer v. Ogilvie*, 3 Cr. & Stew. 434; *Young v. Higgon*, 6 M. & W. 49; *Mygett v. Washburn*, 15 N. Y. 316; *Sheets v. Seldon*, 2 Wall. 177; *Bemis v. Leonard*, 118 Mass. 502; s. c., 19 Am. Rep. 470.

In New Jersey from early times the rule seems to have been to exclude the day of the *terminus a quo*, whether that *terminus* was a day or an event. Thus, the Insolvent Debtors' Act, Pat. Laws, 184, § 7, required creditors to file a plea to the debtor's declaration "within twenty days after filing the said declaration," and this court held that the day when the *narr.* was filed, October 28, was not to be reckoned as one of the twenty, and that a plea filed on November 17 was in season. *State v. Jackson*, 1 South. 323. The same rule is recognized in *Den v. Drake*, 3 Halst. 303; *Thorne v. Mosher*, 5 C. E. Green, 257; *In re Evans*, 2 Stew. Eq. 571, and other cases.

In our legislation also the distinction between reckoning time from a day and reckoning it from an event seems to be disregarded. Thus, in section 105 of the Practice Act, a defendant is required to plead to a declaration served "in thirty days after such service," provided there be indorsed on the same a notice to plead "within thirty days after the date of such service." The service and the date of the service evidently stand for the same thing.

We are of opinion that the statute of limitations should be construed in accordance with these precedents. The statute is in derogation of abstract right, creating a bar to many claims against which nothing can be alleged except its own "*ita scriptum est*," and although courts do not, on this account, regard it with disfavor, yet when its provisions cannot be exactly enforced, but must be either slightly extended or slightly restricted, the fact that it takes away remedies is reason enough for preferring a strict interpretation. *Griffith v. Bogert*, 18 How. 158.

Let the rule to show cause be made absolute, the costs to abide the event of the suit.

NOTE BY THE REPORTER.—See 46 Am. Rep. 410. In *Baker v. Ramsburg's Sons*, 4 Mackey, 1, the court said: "Authorities differ on this point, but we prefer the rule followed in New York and Pennsylvania, which excludes the day on which the cause of action accrues, as a point of time after which the limitation ensues."

EWAN V. LIPPINCOTT.

(47 N. J. Law, 192.)

Master and servant — fellow-servants — contractor's servant.

The defendant, owning a saw-mill, employed master machinists to repair the water-wheel, and the machinists sent the plaintiff with others to do the work. It was understood between the workmen and the defendant that the mill should be run when they were not working on the wheel. While they were so at work, the defendant's engineer negligently started the wheel, injuring the plaintiff. *Held*, that defendant was not liable. (*See note*, p. 154.)

ACTION for personal injury by negligence. The head-note states the facts. The plaintiff had judgment below.

P. L. Voorhees, for rule.

T. B. Harned, contra.

REED, J. This action was brought to recover damages for an injury received by the plaintiff in the mill of the defendant. The plaintiff is a machinist, and while at work upon the water wheel of defendant's saw mill the wheel was suddenly put in motion by the engineer employed by the defendant, and the hand of the plaintiff was crushed.

The trial justice charged the jury, *inter alia*, that if the accident was the result of the negligent act of the engineer, then the defendant, the master of the engineer, was responsible for the result. In answer to the objection interposed by defendant's counsel that the engineer and machinist bore to each other the relation of fellow-servants, and so the master was not chargeable with an injury to one caused by the negligent act of the other, he charged that they were not serving the same master, and so were not engaged in the common employment.

It appears from the evidence that the plaintiff was employed in the regular business of a firm of machinists named Derby & Weatherby, and that they, upon an order given to them by the defendant to make some alteration in the gearing of his water-wheel, sent the plaintiff with another of their workmen to execute the order.

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Upon this appearing in the case it was urged below, and there accepted as the law and is now insisted here, that while the engineer was the servant of the defendant, the plaintiff was the servant of Derby & Weatherby, and as their employment was by different masters, they were not fellow-servants.

In respect to this phase of the plaintiff's case it would seem that if it be admitted that the service in which Derby & Weatherby were employed was a service in common with that of the engineer, then the service of the workmen sent by the firm was also a common service. And I think it would follow that in respect to the rule which relieves the master from liability for injuries received by one at the hands of another fellow-servant, the workman was to be regarded, while doing this work, as the servant of the defendant.

The owner of the mill had the control of the workmen to the same degree that he would have had over the masters of the workmen had they done the work personally. He had the power to direct the work in regard to the extent and character of the alterations, and in respect to the time at which and the circumstances under which it was to be done. He had the power to change, terminate or suspend the work at any moment. Had an injury resulted to a third person by reason of the negligent act of such workman while acting within the line of the employment for which Derby & Weatherby had been engaged, there could be no doubt that the defendant would have been liable to the injured person. *Stone v. Coleman*, 15 Pick. 297.

An examination of the cases in which the character of a servant has been considered will however disclose the fact that there is no legal test of service by which in all cases it can be determined whether an employee is a servant. He may be a servant for one purpose and a volunteer or contractor for a different purpose. He may be the servant of one master viewed in one aspect, and at the same time be considered as the servant of another person for the purposes of carrying out a legal policy.

Concerning this last remark, Mr. McDonnell, in his well-digested book on this branch of the law, speaking of the observation of Baron PARKE that a man cannot be the servant of several masters at the same time, thus writes: "A. cannot be the servant of B. and C. in the sense that he is bound to obey both. He may however be the servant of both in such a sense that he may be prosecuted for embezzlement by B. or C. as a clerk or servant; that B.

or C. may be liable to strangers for his torts, and that while the servant of B. he cannot claim damages against C. for the acts of C.'s servants, inasmuch as he is in law their fellow-servant." *McDonnell Mast. and Serv.* 46.

The accuracy of the last clause in the above observation is apparent from an examination of a number of cases in which this duality of service was recognized. In the case of *Wiggett v. Fox*, 11 Exch. 832, the defendants, who had contracted with the Crystal Palace Company to erect a tower, made a subcontract with M. and four others to do by piece particular portions of the work. The workmen of the subcontractor were paid weekly by the defendants, according to the time which they worked. The subcontractor received from the defendants' foreman directions as to the execution of the piece-work. The persons who contracted with the defendants to do piece-work signed printed regulations by which they were not at liberty to leave their employment till after they had completed their work, and had given a week's notice. A man who was employed by a subcontractor was killed by a workman in the service of the defendants. The jury found that the deceased was the servant of the subcontractor. The court remarked that the subcontractor and all his servants must be considered, for this purpose, the servants of defendants whilst engaged in doing work, each devoting his attention to the completion of the whole work, and working together for that purpose.

In the case of *Johnson v. City of Boston*, 118 Mass. 114, an action was brought against the city of Boston for an injury caused by the falling in of a sewer through the negligence of a servant of the city. The plaintiff was employed by one Tinkham, whose business was the blasting of rock for whomsoever employed him. Tinkham sent plaintiff to blast out the bottom of a sewer for defendants. The city employed Tinkham, paying him for each man a *per diem*. The court, in holding that plaintiff was a fellow-servant with the workman who caused the injury, remarks: "If Tinkham, the plaintiff's employer, had been the person injured while engaged in the same work, he would clearly have been in the position of a fellow-servant with those who excavated the earth. The only point of difference in the position of the plaintiff is that by virtue of a previous agreement between himself and Tinkham the latter was entitled to determine whether and how long he should be employed upon any part of defendant's work, and receive from defendant the

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compensation due for such service. But while he was so employed he was in the service of the defendant, doing the work of the defendant, of which Tinkham had no control, and in the result of which he had no further interest than to receive the reasonable or stipulated rate of wages as for a personal service. The existence of this general relation of master and servant between the plaintiff and Tinkham does not exclude a like relation with the defendant to the extent of the special service in which he was actually engaged. This was conceded in *Kimball v. Cushman*, 103 Mass. 194; s. c., 4 Am. Rep. 528, as to liabilities to a stranger for the negligence of one employed in a special service. The result of the discussion and the authorities cited in *Hilliard v. Richardson*, 3 Gray, 349, would seem to be that while engaged in the work of excavating the sewer the plaintiff was the servant of the defendant, so far as to make the defendant liable to strangers for the negligent conduct of that work." The liability of a master for the acts of a person employed by his servant is further exhibited in the cases cited by Mr. Wood in his work on Master and Servant (section 308). The result of all these cases is to place the plaintiff in the position which would have been occupied by Derby & Weatherby, and so far as concerns the work done upon defendant's mill, to place him in the position of servant of the defendant.

There is another condition required however beyond the fact that the injured and the injuring servant were in the service of the same master, to relieve the defendant from the operation of the rule of *respondeat superior*. The service must not only be under the same master, but the employment must be one having a common object. The most approved test of employment of this character is whether the injured servant can be said to have apprehended the possibility of injury from another servant while engaged in the service for which he hires. It is not necessary that both be engaged in the same or similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages. Underhill Torts, 52.

Similar language was employed in the case of *Morgan v. Vale of Neath Railway Co.*, L. R., 1 Q. B. 149, and in the case of *Lovell v. Howell*, 1 C. P. Div. 161; and this test was adopted by the Court of Errors in the case of *Burns v. McAndrews*, 39 N. J. L. 117. The language used is this: "Common employment is service of

such kind that in the exercise of ordinary sagacity all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants it may probably expose them to injury."

The two cases in the Court of Queen's Bench and Court of Common Pleas Division have been by me selected from a number of cases in the English courts in which the same test has been recognized and applied, and the facts to which this rule was applied in the first of these two cases are, in my judgment, much like the facts in the present cause.

In this case of *Morgan v. Vale of Neath Railway Co.*, the facts were these: The plaintiff was in the employment of the railway company as a carpenter, to do any carpenter work for the purposes of the company. He was standing on a scaffolding, at work on a shed close to the line of the railway, and some porters in the service of the railway company shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured. The court held that the carpenter and porters were fellow-servants.

Not unlike this case is that of *Besel v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 171. The plaintiff was a car-repairer, and while under a car at work, an engine started to draw off from the repair track such cars as had been repaired. A coupling broke and some cars descended, struck the car which deceased was repairing, and killed him. It was held that the yard-master and head brakeman were co-employees of the car-repairer, and for the negligence of either of the two former the defending company were not liable to the plaintiff. To the same effect, and involving nearly the same facts, is the case of *Valtez v. Ohio and Mississippi Railway Co.*, 85 Ill. 500.

In respect to the rule that the common employments may be dissimilar and in different departments of the same business, the case of *Ross v. N. Y. C. & H. R. R. Co.*, 5 Hun, 488; s. c., 74 N. Y. 617, is instructive. The plaintiff was engaged in the capacity of a surveyor and was injured through the negligence of a conductor while he was being transported, free of charge, from his place of residence to his work. It was held that he was a co-employee of the conductor.

So, in the case of *McCosker v. Long Island R. Co.*, 84 N. Y. 77, a man employed by the yard-master was killed through the negligence of the yard-master. It was held that they were engaged in a common employment.

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So in the case of *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. 228, a common laborer engaged in repairing the road-bed was killed, while riding in a train to his work, by the negligent management of the train; it was held that there was no recovery. To the same purport is the case of *Ryan v. Cumberland Valley R. Co.*, 23 Penn. St. 384.

In the English cases the remark of Mr. McDonnell, that the courts have given a very wide signification to "fellow-servants" is illustrated by the cases cited by him. McDonnell, Master and Serv. 304.

Now from this statement of the general principle upon which the determination of a common service rests, and in view of the cases in which it has been illustrated, let us turn to the posture of the parties in the present action. The defendant was engaged in the business of cutting timber by means of a mill run by water or steam. He employed hands to operate the mill, among them an engineer. He called in the plaintiff to make some changes in the gearing of the machinery, and while the latter was at work, he received the injury, by reason, as he claims, of the negligent act of the engineer in starting the wheel upon which he was at work.

If the mechanic had been engaged, generally to keep the mill in repair, and had received this injury while engaged in such general employment, would there exist a doubt that he was a co-servant with the others employed about the mill, engaged in common service? The general object was the preparation of uncut timber for the market, by turning it into lumber.

Now this mechanic was certainly as closely connected with the common object as the carpenter, car-repairer or road repairer was to the common purpose of a railroad company.

He would seem to be so clearly within the rule of a common service that discussion would be wasted.

Nor can I perceive in what way this case is variant from the fact that this service was an occasional or job service.

It is the quality, not the length of time or extent of the work, which fixes, in this respect, the character of the servant and service. The servant may be engaged by the day, week or year, or by piece-work, yet if his employment is in the way of accomplishing a result which other employees are also working to bring about, their service is common. In no case have I discovered a suggestion that the length of time in which the person is engaged in work determines the question of service in respect to the liability of the master for his acts, or for injuries to him at the hands of other servants.

In the argument at bar on this branch of the case, the point made was that the machinist was called upon to equip the mill for work, and that his employment was limited to that, and ceased when that was accomplished; that on the other hand, the employment of the engineer was limited to running the mill.

But it must be kept in view that the mill had been running, and was to continue running, at intervals, while the alterations were being made. The plaintiff knew this, for according to his own story of his engagement, the danger of running the mill at all, while he was working, was discussed by himself and the defendant. He says that the defendant promised that the mill should not be started while he was below at work upon the wheel, but it was understood between them that it should run while he was preparing the work for its application to the wheel.

There was conflicting testimony as to what was said by the defendant, but there is no conflict in regard to the fact that the plaintiff understood that the mill was to be operated at such intervals of time as the plaintiff was not actually at work upon the water-wheel. The question is not presented whether the defendant made a promise, for not keeping which he became liable to the plaintiff, but whether the machinist was a fellow-servant of those who were operating the mill. In this aspect of the case, I am unable to distinguish this machinist from the railroad carpenter or the repairer of cars or road-bed of a railway company, who were employed to keep in working order the appliances by which the corporations were enabled to operate their multifarious business. They are each engaged in forwarding a common enterprise, and are to all others concerned in the same undertaking, fellow-servants engaged in a common employment.

I think, in ruling otherwise at the trial there was error, for which there should be a new trial.

NOTE BY THE REPORTER.—This case must be distinguished from those involving the liability of a master for an injury to his contractor's servant by defects in his machinery. Wood says (Master and Servant, § 887): "Although a contractor is not in general liable to the employees of the contractor for injuries resulting to them while engaged in his work under the contract of such contractors, yet if the work is done on his premises he is bound by the same legal obligation that exists as between him and his immediate servants, to keep them in a safe and suitable condition, and is liable to any of the servants of such contractor for injuries resulting to them from defects therein, not under a contract obligation, but from the duty he owes to each of the

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employees arising out of his obligation to provide such appliances, and this duty extends to keeping the premises upon which the servants of the contractor are at work, in a reasonably safe condition, whether the contract provides for it or not." "But this * * * is limited to cases of defects in his own premises." Citing *Coughtry v. Glove Woolen Co.*, 56 N. Y. 124; s. c., 15 Am. Rep. 387.

It must also be distinguished from the case of claim of liability of a master for an injury by the carelessness of one of his contractor's servants to another of such servants. He is under no liability in such case. *Hawkins v. Standard Sugar Refinery*, 122 Mass. 400; *Hunt v. Penn. R. Co.*, 51 Penn. St. 475.

On the precise question involved in this case Mr. Thompson says (Neg. 1040): "Nearly all the definitions of fellow-servants given in the books make it essential to the relation that they should be servants of *the same master*. The employees of an independent contractor would seem not to be, in any proper sense, employees of the proprietor for whom the contractor has engaged to do the work. If therefore an employee of such a contractor is injured by the negligence of an employee of the proprietor, it would seem that the maxim *respondeat superior* ought to apply, and that such proprietor should pay damages." Of the *Johnson* case cited in the principal case he says it is put "on grounds which are not very clear."

In *Seenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 108, the court said: "There was no proof that the plaintiff and the man who caused the injury to him were fellow-servants. The latter was in the employment of the defendant, engaged in unloading the cargo from the steamship upon the lighter. The former was in the service of the owners of the lighter, in receiving the cargo and transporting the same to the city of New York. They were not the servants of a common principal in any sense, and they were not strictly engaged in the same employment. The duties of the one were confined to the steamship and of the other to the lighter. Hence this case does not fall within the rule that an employer is not responsible for an injury occasioned to one employee by another engaged in the same general employment." Citing *Smith v. N. Y. & H. R. Co.*, 19 N. Y. 137, holding that a switch tender employed by a railroad company on a part of its track on which it permits another company to run its trains is not a fellow-servant with the servants of the latter company.

In *Young v. N. Y. Cent. R. Co.*, 80 Barb. 229, it was held that a servant of a contractor for repairing a railroad bridge injured by a passing train, through the negligence of the company's servants, may recover from the company. "The ground of exemption of the master," said the court, "in all these cases, is the privity of contract between him and the person injured, from which the law presumes an agreement between them for a compensation equal to the risk and peril of the service. If therefore the plaintiff in this case was not, in any legal sense, the servant or employee of the defendants, but was the servant or employee of another, and there was no privity between him and the defendants, the decisions referred to do not apply, and the defendants must be liable upon the general rule, to the plaintiff, the same as to any other stranger. The defendant can claim no benefit or exemption from a contract made between the plaintiff and another party, whatever risks he may have assumed as between

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himself and his employer. * * * If Fowler was a contractor with the defendants to do this job, he was not in any legal sense their servant or employee, and the men employed by him to do the work certainly stood in no such relation to the defendants. They were his servants exclusively, and between them and the defendants there was no privity whatever. And I think it cannot be doubted that had one of the persons employed by the defendants to run their trains been injured by the negligence of one of the persons so employed by Fowler, he would have been answerable for the negligence. It could scarcely be pretended, in such a case, that the negligent and the injured employees were both servants of the same employer, and the rule must be reciprocal."

The facts in *Donaldson v. Miss. & Mo. R. Co.*, 18 Iowa, 280, were quite similar to the last case and the like ruling was made, without much argument and on other grounds. "The deceased, although a sub-contractor for the building of bridges, and therefore indirectly in the employ of the defendants, yet his duties were so entirely in another department, and wholly disconnected with operating the road, as that his relation to the employees managing the train which ran over him cannot be, in any proper sense, said to be that of a co-servant."

The like holding was made in *Barrett v. Singer Mfg. Co.*, 1 Sweeney (N. Y. Com. Pleas), 545. "He was the servant of the contractor, and the rule of *respondeat superior* has no application."

In *Abraham v. Reynolds*, 5 E. & N. 142, the plaintiff, a servant of A., employed by the defendant to carry cotton from his warehouse, was receiving the cotton into his lorry, when by the negligence of the defendant's porter, in lowering a bale, it fell on him. *Held*, that the defendant was liable. POLLOCK, B., said: "Here it is said that there was common work. If it was agreed that his work should be done by all, the rule might apply; but it does not apply merely because the parties had a common object, if they had separate ends, and for some purposes antagonistic interests." WATSON, B., said: "The plaintiff was the servant of Jump, the carter. The defendant had no contract over him." "They are persons doing work for a common object, but not under the same control or by the same orders." CHANNEL, B., distinguished *Wiggett v. Fox*, cited in the principal case, on the ground that Fox had a contract over and power to dismiss Wiggett.

Clark v. Turnbull.

CLARK V. TURNBULL.

(47 N. J. Law, 205.)

Duress — lawful process — no cause of action.

One who is imprisoned under lawful process on an unfounded cause of action cannot avoid a contract made to procure his release on the ground of duress.

ACTION on a note. The opinion states the case.

C. D. Hodges, for motion.

P. H. Gilhooly, contra.

KNAPP, J. The plea filed by defendant is asked to be stricken out as a sham plea, because the defendant is without defense to the action.

The plaintiff sues upon a promissory note made by the defendant, payable to the order of Henry E. Turnbull, and by the latter indorsed to the plaintiff.

The testimony shows that the note in suit was made under the following circumstances: The plaintiff advanced money to Henry E. Turnbull, in the city of New York, to the amount of about \$4,000. She declares that he received the money, as her agent, to invest for her in good interest-bearing securities, and that he fraudulently appropriated the money to his own use. The defendant claims that the money so advanced to Henry E. Turnbull was placed with him as a stockbroker, under instructions to invest in stock speculations on margins, and that it was used in such gaming transactions and lost.

To assert her claim for this money as a debt, the plaintiff brought suit against Henry E. Turnbull in one of the courts of New York, under which legal proceeding the defendant therein was arrested and taken into custody. And while so in custody, in an arrangement to settle that suit, Walter A. Turnbull, his brother, the defendant in this suit, was called in to participate, and did so by advancing for Henry \$1,200 in cash, and giving to him the promissory note now in suit, which Henry indorsed to plaintiff for the balance. Henry was thereupon released from his imprisonment, and the suit against him was subsequently discontinued.

Out of the situation thus portrayed, the defendant claims that two grounds of defense arise to him which he is entitled to have passed upon. One is that the note in suit was obtained by duress of imprisonment, from the principal who held the note as accommodation paper; the other that no debt was due from Henry to the plaintiff at the time suit was brought, or when possession of the note was obtained by his indorsement to her in settlement; that the discharge from imprisonment lost her no right and the note is therefore without consideration.

To entitle the plea to stand against a motion like this, it is sufficient that the defendant present some ground which, if maintained, will answer the action. If the defense rests upon controverted facts, it is his right to have the verdict of a jury in settlement of such controversy.

The only matter of fact in dispute between the parties is that already referred to, relating to the nature of the transactions between the plaintiff and Henry before the suit in New York and out of which it grew. They agree on all other essential matters.

We must inquire then, first, whether under the admitted facts there is evidence for a jury that the plaintiff obtained the security through duress of her debtor. I take it to be the settled law that where one believing he has a cause of action against another, by lawful process causes him to be arrested and imprisoned, and the defendant voluntarily executes a deed or makes a contract, or pays the money claimed for his deliverance, he cannot avoid such deed or contract by duress of imprisonment, or reclaim the money as extorted from him, although, in fact, the plaintiff had no good cause of action. 1 Bl. Com. 136; *Watkins v. Baird*, 6 Mass. 506, and cases cited.

Chief Justice PARSONS, in *Watkins v. Baird*, in discussing the subject, says: "It is a general rule that imprisonment by order of law is not duress, but to constitute it, either the imprisonment or the duress after must be tortious and unlawful."

It is not pretended that the imprisonment in New York was unlawful, or that afterward the arrangement for giving the note was coerced or even asked for by the plaintiff. Under the defendant's own showing therefore he has not this defense.

As to the second alleged ground of defense, in my judgment it is not open to the defendant here.

The law favors the compromise and settlement of controversies

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and litigations, and where a promise is made on the compromise of a doubtful claim, the compromise is a good consideration for the undertaking and the promise is binding. *Conover v. Stilwell*, 5 Vroom, 54. Attention is called to the diversity in judicial opinion in the law courts as to the degree of strength requisite in a claim to make a compromise of it a good consideration where the claim is not actually in suit.

But where legal proceedings have been instituted, an agreement in its compromise is good and valid regardless of the validity of the plaintiff's demand, and whether the suit could have been prosecuted to a successful issue or not. These cannot be set up in bar of the action upon the promise. *Longridge v. Dorville*, 5 B. & Ald. 117; *Edwards v. Bough*, 11 M. & W. 641; *Cooper v. Parker*, 14 C. B. 118; s. c., 15 C. B. 822; *Morey v. Newfane*, 8 Barb. 645.

This rule, both in England and America, seems to be without exception in the absence of fraud or duress.

The defendant in the New York suit would not be permitted to set up, against his own promise in settlement, invalidity of the plaintiff's claim or cause of action. And the defendant here, whether his promise be regarded as made in the capacity of surety for his brother, or as an original promisor, is under the same disability under the facts admitted by him. *Smith v. Monteith*, 13 M. & W. 427.

There is no fraud alleged on the part of the plaintiff in prosecuting her claim originally, or any want of good faith in asserting a claim to be paid the money advanced by her as a debt.

The defendant shows with entire clearness that he has no tangible defense to this action, and the motion to strike out the plea is granted.

BLACKBURN V. REILLY.

(47 N. J. Law, 280.)

Contract — of sale — successive deliveries — breach.

On a contract for sale of goods by successive deliveries and payments, a default in respect to one or more will not discharge the other party unless it is evident that the defaulting party intends no longer to fulfill. *

* See *Scott v. Kittanning Coal Co.* (89 Penn. St. 231), 33 Am. Rep. 753; *King Philip Mills v. State* (R. I. 82), 34 Am. Rep. 603.

ERROR to the Supreme Court. Action for breach of contract. The opinion states the point. The plaintiff had judgment below.

F. W. Stevens, for plaintiff in error.

Joseph Coult, for defendant in error.

DIXON, J. [Omitting a minor question.] The other question discussed on the argument was, whether the defendant had the right to refuse to receive any more bark in case he could satisfy the jury that the five loads of bark delivered were not equal in quality to the requirements of the contract.

The contract provided that the plaintiff should deliver, and the defendant should receive, one car-load of bark weekly for a year at \$18 a ton, payable on delivery. It belongs to a class of agreements sometimes called continuing contracts of sale, because they are to be completely performed, not by single acts of delivery and payment, but by a series of such acts at stated intervals.

The rule to be applied in determining whether the express obligations of such contracts remain, after one or more breaches by either party, has been the subject of much discussion of late years, and has given rise to some contrariety of judicial opinion. We do not feel constrained by the phases of the present case to enter at any length upon the details of this discussion. In our opinion, the rule established in England by the judgment of the House of Lords in *Mersey Steel and Iron Company v. Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeals in s. c., 9 Q. B. D. 648, is one which in ordinary contracts of this nature will work out results most conformable to reason and justice. The rule is, that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain. It also accords with the ancient doctrine laid down by Serjeant WILLIAMS in his

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notes to *Pordage v. Cole*, 1 Saund. 320, b, that whether a covenant (of the plaintiff) goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract on the part of the defendant without averring performance in the declaration. It of course is inapplicable where the parties have expressed their intention to make performance of a stipulation touching a part of the bargain, a condition precedent to the continuing obligation of the contract; and peculiar cases might arise where the courts would infer such an intention from the nature and circumstances of the bargain itself, cases in which the courts would see that the partial stipulation was so important, so went to the root of the matter (to use a phrase of BLACKBURN, J., in *Poussard v. Spiers*, 1 Q. B. D. 410), as to make its performance a condition of the obligation to proceed in the contract.

The case in hand is one of ordinary character, and therefore the question under the rule is, whether the circumstances would warrant an inference by the jury that the plaintiff purposed to abandon the contract, or no longer be bound by its terms. This question is, we think, not doubtful. The plaintiff had delivered five car-loads, which had been accepted and paid for by the defendant, without any intimation that they were not satisfactory, was ready to deliver the sixth when the defendant requested delay, and was prevented from further deliveries only by the peremptory refusal of the defendant to receive any more. Against this refusal the plaintiff protested, then proposed an arbitration, and threatened suit if the defendant should persist, and finally brought this action for damages. In the face of all this there is not a shadow of reason for saying that the plaintiff had abandoned or repudiated the contract. If the five deliveries of defective bark had been made against notice and remonstrance, it might have suggested the idea that the plaintiff meant to disregard his obligations, but by the defendant's acceptance of and payment for the bark without objection, this ground for a possible inference of repudiation is wanting in the case. We regard it as incontestable that the deliveries were made in recognition of the binding force of the agreement. The defendant therefore was not discharged.

Cohen v. Platt, 69 N. Y. 348; s. c., 25 Am. Rep. 203, was precisely like the case before us. The plaintiff had agreed to sell the

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defendant glass to be delivered in installments. He had made several deliveries which had been accepted and paid for by the defendant. Subsequently the defendant complained of the quality and refused to receive any more. The suit was for damages resulting from the refusal, and the plaintiff recovered. *Scott v. Kittanning Coal Co.*, 89 Penn. St. 231; s. c., 33 Am. Rep. 753, was also similar, but there the defendant contended that the conduct of the plaintiff in the delivery of the defective coal was fraudulent. Yet the court held the defendant would not be thereby discharged.

There was no error in the ruling of the trial justice on this proffered defense.

The judgment below should be affirmed.

Judgment affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, DEPUY, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, PATTERSON, WHITAKER.

For reversal—None.

PAWELSKI V. HARGREAVES.

(47 N. J. Law, 334.)

Statute of frauds—what is contract of sale.

Defendants went to the shop of plaintiff, wagon and carriage-makers, to purchase brewery trucks. Plaintiff having none on hand, ordered them with the defendants' assent from wagon-builders in another city. The trucks were accepted and paid for by plaintiff. Some alterations were made by plaintiff, at defendants' request, and a painter, employed by the defendants, painted their names and business on the sides of the trucks while on the plaintiff's premises. *Held*, a contract for sale of goods within the statute of frauds. (See note, p. 164.)

ACTION for price of goods. The head-note states the facts. The plaintiff had judgment below.

Z. M. Ward, for plaintiffs.

John W. Griggs, for defendants.

SCUDDER, J. The controversy between these parties may be narrowed to a very close issue, which is easily determined. The

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defendants refused to pay for the trucks when the money was demanded before they were taken from the plaintiff's premises, and when sued for damages under the contract say that they are not bound within the terms of the sixth section of our statute of frauds. There was no writing, no acceptance and actual receipt, nor was any earnest given or part of the purchase-money paid. There was some point made at the trial that there had been an acceptance and receipt of the trucks when they first arrived, based on the facts that the defendants' team assisted in carting them from the depot to the plaintiff's factory, and afterward at the defendants' request, the trucks were moved to the painter's shop and there painted and lettered with the defendants' names and business. But they did not leave the plaintiff's premises, nor is there any evidence to show an actual or even a constructive delivery and acceptance. The testimony is too light to admit of any consideration, and it was put aside briefly and decidedly in the charge of the court.

The mooted question upon which the main exception was taken to the charge was whether there was a contract for the sale of goods, wares and merchandise, for the price of \$30 or upward, which the statute of frauds says shall be void, between the plaintiffs and defendants; or were the plaintiffs only the agents by whom the defendants made this purchase of the Milburn Wagon Company?

The attempt to draw the facts of this case into the disputed realm of what are sales within the statute and what are contracts for work and labor without the statute, which has been so well discussed in the case of *Finney v. Apgar*, 31 N. J. L. 266, is not satisfactory. The trucks were existing at the time of the contract, *in solido*, and were not to be made according to order; nor as things distinguished from the general business of the plaintiffs, for they were in the direct line of their business, and with that knowledge the defendants sought them to obtain the trucks. Whether these articles which were needed were standing in the salesroom of the plaintiffs ready for delivery with slight alterations and adaptations, or whether they were in the salesroom of a business correspondent in a distant city, who was ready to sell and forward the goods to them on their credit, without knowing or caring who their customer might be, can make but little difference. The result would, in either case, be that by the intention of the parties there would be a transfer, for a price, from the plaintiffs to the defendants, of chattels in which the defendants had no previous property; and accord-

ing to the rule as formulated by Mr. Benjamin in his book on Sales, (Corbin's ed., vol. I., p. 121), this would be a contract for the sale of a chattel within the statute of frauds. Whether in this case the plaintiffs bought the trucks of the Milburn Wagon Company as principals, or agents for the defendants, does not arise, for the facts do not warrant an inference of agency in the purchase. The transaction is as simple as if one should seek a certain kind of goods in a store where they are usually made or kept, and not finding them, request the tradesman to send elsewhere to procure them. This would be an ordinary accommodation in the way of business, and as much a contract for sale as if the goods were present for immediate delivery and acceptance. The short interval of time and distance required to complete the purchase will not alter the result or change the relative position of the parties. The difference in the price paid for the articles to the third person and that to be received will be a profit in a sale rather than a commission for brokerage or agency. In this case the plaintiffs bought the trucks in Ohio to sell to the defendants on their order, and they make their usual or agreed profit in their business. It was therefore clearly a contract for sale within the statute of frauds.

The court in their charge left it to the jury to say whether the arrangement between the plaintiffs and the defendants was a contract for the sale of goods by the plaintiffs to the defendants, or whether according to the plaintiffs' story, the contract was for the sale of goods from the western company to the defendants. As there was no case made by the plaintiffs for this choice which was given to the jury, there was error in the charge, and the judgment will be reversed.

For affirmance—THE CHIEF JUSTICE.

For reversal—THE CHANCELLOR, DEPUE, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, PATERSON.

NOTE BY THE REPORTER — The leading case on this subject in England is *Clayton v. Andrews*, 4 Burr. 2101, where the contract was for the delivery, in future, of wheat, to be threshed, but unthreshed at the time of the bargain. Lord MANSFIELD held this contract not within the statute, "which relates only to contracts for the actual sale of goods, where the buyer is *immediately* answerable, without time given him by special agreement, and the seller is to deliver the goods immediately." He cited *Towers v. Osborne*, 1 Str. 506, a case of a chariot to be made.

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In *Groves v. Buck*, 3 M. & S. 178, Lord ELLENBOROUGH held a contract for the purchase of a quantity of oak pins, not then made, but to be cut out of slabs, not within the statute. "It was incapable of delivery and of part acceptance." It does not appear whether the vendor had the slabs.

In *Wilks v. Atkinson*, 6 Taunt 12, a contract for selling and delivering oil, not yet expressed from the seed in the vendor's possession, was held exempt within the statute of stamp duties as a contract relating to the sale of goods. GIBBS, C. J., said: "A baker agrees to produce me a loaf to-morrow; he has not the bread, but he has the flour, and is to make it into bread and deliver it. How often does a butcher contract to deliver meat, when he has not the meat, and the beast is not yet killed."

In *Rondeau v. Wyatt*, 2 H. Bl. 68, the contract was to buy flour for exportation, and deliver it on board ships. This was held within the statute, although executory. Lord LOUGHBOROUGH recognized *Towers v. Osborne*, and said of *Clayton v. Andrews*, that it went on "a very nice distinction, but still the work to be performed in threshing made, though in a small degree, a part of the contract."

In *Cooper v. Elston*, 7 T. R. 14, a sale by sample in one place to be afterward delivered in another was held within the statute. Lord KENYON said: "After this question has been afloat so long in the courts, I am glad that by the very able decision of the Court of Common Pleas, in the case of *Rondeau v. Wyatt*, the construction of this clause of the statute of frauds is brought back to the manifest intention of the legislature in making that provision. To the authority of that case I entirely subscribe, and in my opinion it governs the present. The doctrine which was laid down in *Clayton v. Andrews*, as to executory contracts not being within the statute, was taken from *Towers v. Osborns*. I will not pretend to say that those cases were not rightly decided upon their particular circumstances. The latter was a mere contract for work and labor; the thing contracted for did not exist at the time. In the former also something was required to be done to put it in the state in which it was contracted to be sold." ASHURST, GROVE and LAWRENCE, JJ., took a similar view.

In *Garbutt v. Watson*, 5 B. & Ald. 618, the contract was for the delivery of flour "to be got ready" by a miller. "The flour, at the time of the bargain, was not prepared, so as to be capable of being immediately delivered to the defendant." Held, within the statute. ABBOTT, C. J., said *Towers v. Osborne* "is an extreme case and ought not to be carried further. BAYLEY, J., said the decision in *Clayton v. Andrews* was "corrected by *Rondeau v. Wyatt*." HOLROYD, J., "cannot agree with the judgment of the court in *Clayton v. Andrews*."

In *Watts v. Friend*, 10 B. & C. 446, A. agreed to supply B. with turnip seed, which B. was to sow on his own land, and sell the crop to A. Lord TENTENDEN said: "According to good common sense this must be considered as substantially a contract for goods and chattels," and within the statute.

In *Lee v. Griffin*, 11 B. & S. 272, a contract to make a set of artificial teeth was held within the statute. CROMPTON, J., said: "Where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods."

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"I do not agree to the proposition that the value of the skill and labor, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor or for the sale of a chattel." BLACKBURN, J., said: "If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." "If a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

The leading case in New York is *Sewall v. Fitch*, 8 Cow. 215. The contract was for a quantity of nails, not then on hand, but which the seller said "could be soon knocked off" and sent on the opening of navigation. *Held*, not within the statute. SAVAGE, C. J., said *Towers v. Osborne* and *Clayton v. Andrews* "were rightly determined, though upon a wrong principle, as has since been held both by the Common Pleas and the King's Bench."

In *Crookshank v. Burrell*, 18 Johns 57, the same was held of a contract to make a wagon.

In *Downs v. Ross*, 28 Wend. 270, the contract was for the delivery of wheat, part in granary and part unthreshed, that in granary to be cleaned again, and the rest threshed. *Held*, within the statute. BRONSON, J., says of the cases cited to the contrary, "with a single exception, they all relate to contracts for the sale of a thing *not then in existence*, but which was to be constructed or manufactured by the vendor." Citing the cases of the chariot, the oak pins, the buggy, the wagon and the nails. The exception, *Clayton v. Andrews*, he pronounces overruled. COWEN, J., however dissented.

In *Seymour v. Davis*, 2 Sandf. 289, a contract to sell and deliver cider in future, to be procured from farmers and refined by the seller, was held within the statute.

In *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495, is a very learned review of this subject by DALY, C. J., in which he says: "It may be stated as the result of several well considered cases that where the contract is for an article coming under the general denomination of goods, wares and merchandise, and it is made with one who sells that kind of commodity to all who traffic in it, the quantity required and the price being agreed upon, it is a contract of sale, and that it in no way affects the character of the contract in such a case, whether the manufacturer and vendor has, when the order is given, the requisite quantity on hand or has to manufacture it afterward. * * * But if what is clearly contemplated by the agreement is the skill, labor, care or knowledge of the one who fabricates the article or commodity, or if it would not have been produced if the order had not been given for it, or if, when produced, it is unfitted for sale as a general article of merchandise, being adapted for use only by the person ordering it; then the contract is one for work and labor, and is not within the statute." He doubts *Sewall v. Fitch*, and pronounces *Downs v. Ross* "still more doubtful," and now repudiated. This was followed in *Plint v. Corbitt*, 6 Daly, 429, where the defendant selected some furniture

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and ordered it covered in a certain material to be furnished by the plaintiff. This is clearly to the contrary of *Mixer v. Haworth*, *post*.

In *Kellogg v. Witherhead*, 6 Thomp. & C. 525, the same was held of a contract to buy hams, to be smoked. "The plaintiffs were not to make the hams; they were to smoke them."

In *Mead v. Case*, 33 Barb. 202, the agreement was for a monument, the pieces of which had been put together, but which the plaintiff was to polish, letter and finish. *Held*, not within the statute. The court said: "It is very plain, I think, that the monument bargained for was to be afterward made, by the plaintiff's labor and skill, and had no existence as such at the time of the bargain. * * * It was precisely this labor and skill that was necessary to convert it into the monument which the plaintiff agreed to furnish. Without this, it was no monument whatever; certainly not to the defendant's deceased relatives. A monument is something designed and constructed to perpetuate the memory of some particular person or event. Before the material was polished and the inscriptions engraved upon it, it was a mere structure of stone, blank and meaningless. It was not this stone, in this condition, that the defendant bargained for; if it had been, the contract would most likely have been within the statute. What he bargained for was the necessary labor and skill to convert this stone into an enduring memorial of the dead. This labor and skill did not convert the stone into an article of general merchandise, but into the particular thing bargained for. For any other purpose the valuable material had been wholly destroyed. It was then entirely unfitted for a sale to any other person; or for any other purpose." DALY, C. J., in the case of *Passaic Mfg. Co. v. Hoffman*, pronounces this reasoning conclusive; on the other hand, DWIGHT, C. J., in *Cook v. Millard*, 65 N. Y. 363, pronounces it "highly strained." SMITH, J., dissented, giving an excellent review of the cases.

In *Bates v. Coster*, 1 Hun, 400, an agreement to buy a stallion colt, to be altered and kept by the plaintiff till he got well, was held within the statute. The court doubted *Mead v. Case*.

In *Fitzsimmons v. Woodruff*, 1 Thomp. & C. 3, a contract for a marble mantel, to be put up in a house with certain alterations and fixtures, was held within the statute.

In *Donnell v. Hearn*, 17 N. Y. W'kly Dig. 463, a contract to manufacture certain lamps of a peculiar and unusual pattern was held not within the statute. So in *Pierce v. Bouton*, 17 N. Y. W'kly Dig. 444, of a contract to imitate certain woven goods in felt, of a kind not usually dealt in by the plaintiff.

In *Smith v. N. Y. Cent. R. Co.*, 4 Keyes, 117, it was held that a contract for the delivery of wood to be cut from standing trees is within the statute. Citing *Downs v. Ross*, and *Garbutt v. Watson*, and *Smith v. Sarman*, 9 B. & C. 561, a precisely similar case. The court, by WOODRUFF, J., said: "There would seem no very sensible reason for holding, with reference to two verbal contracts with wagon makers for the purchase and delivery of twenty wagons on a future day named, that one is void because the wagon maker has the wagons on hand, and the other is valid because the other wagon maker must manufacture them in order to their delivery at the time appointed. Without however disregarding the cases which hold that where the substance of the contract is

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work and labor to be done in converting materials into a new and totally different article, it is not within the statute, we may say that there is no just notion of manufacture involved in an agreement to deliver a specified number of cords of firewood, no change in the thing sold and to be delivered is contemplated. The circumstance that it stands in the woods at the time involves nothing more than a necessity to cut it, that it may be delivered. In this respect it is not different from a purchase and agreement to deliver wood of a prescribed length, split into pieces of convenient size, the parties knowing and intending that delivery shall be had of wood already cut, but of a greater length and not split at all." But in *Killmore v. Howlett*, 48 N. Y. 589, while a similar contract was held not to be for the sale of an interest in lands, the court said it was "rather a contract by the defendant to bestow work and labor upon his own material, and deliver it in its improved condition to the plaintiff." To the same effect is *Edwards v. Grand Trunk Ry.*, 54 Me. 105. See *Parsons v. Louck*, 48 N. Y. 17; s. c., 8 Am. Rep. 517; *Cooke v. Millard*, 65 N. Y. 852; s. c., 22 Am. Rep. 619.

In *Higgins v. Murray*, 73 N. Y. 252, a contract to make circus tents, materials to be furnished by the plaintiff, was held not within the statute.

The leading case in this country is *Mixer v. Howarth*, 21 Pick. 205, where the contract was for a carriage in the seller's possession, unfinished, and which he was to finish and line with a certain lining selected by the buyer. This was held not within the statute. SHAW, C. J., said: "Where the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery or acceptance, and the remedy for not accepting is on the agreement." Citing *Sewall v. Fitch*, 8 Cow. 215.

In *Lamb v. Crafts*, 12 Metc. 356, where one whose business was collecting rough tallow and preparing it for market, agreed to "furnish" another in the future with a certain quantity of prepared tallow, *held*, within the statute. SHAW, C. J., said: "Where a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract of labor; otherwise, when the article is made pursuant to the agreement. See *Goddard v. Binney*, 115 Mass. 450; s. c., 15 Am. Rep. 112, the case of a contract for building a buggy.

In *Clark v. Nichols*, 107 Mass. 547, the contract was to deliver ash building stuff and plank, the logs to be sawed into plank at the buyer's direction. *Held*, within the statute.

In *Gardner v. Joy*, 9 Metc. 177, A. asked B. what he would take for candles; B. said, so much; A. said he would take so many; B. said they were not made, but he would make and deliver them in the course of the summer. *Held*, within the statute. SHAW, C. J., said: "If it is a contract to sell and deliver goods whether they are then completed or not, it is within the statute. But if

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it is a contract to make and deliver an article or quantity of goods, it is not within the statute." Citing *Garbutt v. Watson*. So in *Waterman v. Meigs*, 4 Cush. 407, an agreement for the delivery of a quantity of planks for ship-building, at a future time, was held within the statute.

In *Hight v. Ripley*, 19 Me. 187, the contract was "to furnish, as soon as practicable," ten hundred or twelve hundred pounds of hoe shanks, according to patterns furnished, and a larger amount at a lower price if required. *Held*, not within the statute. The court said: "A contract for the manufacture of an article differs from a contract of sale in this; the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party, combined with the materials, for which he has contracted, and to which he is entitled."

In *Cason v. Cheely*, 6 Ga. 554, the contract was for a crop of cotton, to be gathered and prepared for market. *Held*, within the statute. The court said: "This contract was not for work and labor in the production of a peculiar article, and generally unsalable, for cotton is, beyond any other merchandise in this country, salable in the general market, and in prompt demand; and although work and labor was necessary to prepare it, yet the contract does not contemplate, primarily, work and labor to be done at the instance of the purchaser and for his benefit, so as to make work and labor the essential consideration between the parties. * * * The same work and labor which he would be required to bestow upon it under the contract, he would have been compelled to bestow upon it if the contract had never been made. This, if there were nothing else to prove it, demonstrates that work and labor were not the consideration of the contract. Whilst he, the plaintiff, was making and laboring to make this cotton, he was making and laboring for himself and not for the defendant."

In *Atwater v. Hough*, 29 Conn. 508, the contract was for sixty-four sewing machines in process of manufacture by a third person for the defendant, together with thirty-six completed, and was *held* to be within the statute. The court said: "The work remaining to be done upon the unfinished machines was not to be done upon the plaintiff's materials, or at his request, or for his use. The thirty-six machines were, and the sixty-four, upon their completion, would be the property of the defendant, and the plaintiff would have no property in any of them until their delivery to him by the defendants. The defendants were to bestow none of their labor, skill or care upon the machines, or to do any thing whatever in the manufacture of them, and it was of no importance by whom they were manufactured or in which market they were procured."

In *O'Neil v. N. Y. and Silver Peak Mining Co.*, 3 Nev. 141, a contract to make brick for B., and deliver them at a certain price, the latter to select the place and clay for the manufacture. *Held*, not within the statute. The court said: "If a miller, regularly engaged in the manufacture of flour, should contract to deliver the next hundred barrels of flour he may manufacture, it is rather difficult to determine whether such a contract is to be treated as a contract to manufacture one hundred barrels of flour or a contract to sell one hundred barrels. Probably if the contract did not induce any change in the com-

duct of the miller, but he merely proceeded with his regular business intending, under his contract, to deliver or sell the first product of his mill, this should be treated as a sale, because the manufacturer has not changed his condition, business or circumstances on account of the contract. But if he contracted to manufacture and deliver some peculiar article, out of the regular routine of his business—for instance, a hundred barrels of kiln-dried corn meal, requiring the purchase of new material and the introduction of new appliances for the drying of the corn, this would undoubtedly, under all the decisions, be held a contract not merely for the sale but rather for the manufacture of corn meal, and not within the statute."

In *Bird v. Muhlinbrink*, 1 Rich. 199, defendant ordered plaintiff, a dealer in military goods, to send to Europe and have certain peculiar sashes made for him, which plaintiff had not in stock. *Held*, not within the statute. The court said: "I am inclined to think that the proposition should be limited so as to embrace only such contracts as primarily contemplate work and labor to be done at the instance of the purchaser, and for his use and accommodation, so as to make the work and labor of the contracting vendor, on such as he may procure to be bestowed at his expense, the essential consideration of the contract."

In *Finney v. Appar*, 31 N. J. L. 266, the contract was for a certain number of sticks for wagon spokes, which the plaintiff said he would "get out." *Held*, within the statute. The court said: "Where a contract is made for an article not existing at the time *in solido*—to use the expression of the old cases—and when such article is to be made according to order, and as a thing distinguished from the general business of the maker, then such contract is in substance and effect not for a sale but for work and materials." "In principle the case seems to fall within the boundaries of that class of cases, which exemplify the distinction between a mere preparation or slight alteration of the form of a thing which in substance exists at the time the contract is made, and the conversion of the raw material into the perfected form of the manufactured article."

See *Pitkin v. Noyes*, 48 N. H. 294; s. c., 2 Am. Rep. 218; *Prescott v. Locke*, 51 N. H. 94; s. c., 12 Am. Rep. 55; *Meincke v. Falk*, 55 Wis. 427; s. c., 42 Am. Rep. 722.

O'BRIEN V. FRASIER.

(47 N. J. Law, 349.)

Malicious prosecution — evidence — plaintiff's character.

In an action for malicious prosecution, the defense being that by mistake of the magistrate in drawing the affidavit the defendant was made to charge a different crime from that intended, the defendant may prove that the crime intended to be charged was true according to his belief.

In an action for malicious prosecution, charging injury to character, the defendant may show the plaintiff's bad reputation in mitigation.

O'Brien v. Frasier.

MALICIOUS prosecution. The head-note states the case. The plaintiff had judgment below.

Stevenson & Ryle, for plaintiff in error.

Z. M. Ward, for defendant in error.

BRASLEY, C. J. The bills of exceptions sent up with the writ in this case present three points for adjudication. These several propositions will be considered in the order in which they stand in the brief of the counsel of the plaintiff in error.

The basis of the suit was the arrest and imprisonment of the plaintiff on an affidavit made by the defendant, containing a charge of perjury, and which charge, it was asserted, had been made falsely, maliciously and without probable cause. The false swearing thus imputed to the plaintiff consisted in a statement made by her under oath, in a suit between herself and the defendant, that a certain bank-book which she had turned over to the defendant contained a credit of a certain sum due from the bank to her. Upon the strength of this affidavit a justice issued a warrant and the plaintiff had been arrested and imprisoned until she was discharged in consequence of the grand jury failing to find an indictment against her. At the trial of the cause it was admitted by the counsel of the defendant that the statements of this affidavit were altogether untrue, and that there had been no probable cause for the arrest and imprisonment of the plaintiff on that particular charge, and the defense was that although he signed the affidavit upon which the warrant issued, he did such act by mistake; that the charge which he intended to make was of a different character; that what he meant to depose was that the plaintiff, on the trial referred to, had sworn falsely with respect to a certain amount of cash she had given him, and not, as it stood in his affidavit, that she had falsified touching the contents of the bank-book which she had transferred to him. In this aspect the defendant was permitted at the trial, when he was on the witness-stand, to testify that he did not intend to charge in his affidavit that the plaintiff swore falsely as to the amount of money placed to her credit in her bank-book, but that she swore falsely with respect to the amount of cash she had paid to him, and that the magistrate before whom he had laid his complaint, from a misconception of his statement, inserted the former instead of the

latter accusation, and that he had ignorantly taken the oath in that form. This offer of proof was rejected by the court, and in effect, the defendant was not allowed to prove that he believed that the plaintiff had perjured herself in her allegation of the amount of cash she had paid to him, and that his purpose had been to charge her with that offense.

The circumstances of the cases are peculiar, but upon reflection I am satisfied that the testimony thus shut out was admissible. It is not regarded as legal on the ground stated in the brief of counsel, which was that it helped to support the defendant's statement that he had not meant to make the particular accusation contained in his affidavit, for such a collateral issue could not be interpolated merely by way of confirmation, but it is conceived that it was legitimate evidence, as it was an essential part of the defense interposed. The case was in this situation: The defendant's affidavit had been produced, and it had been proved that its crimination was without foundation, and without color of foundation. This the defendant admitted, and he thereby confessed that he had made a false charge of crime against the plaintiff, resting on no probable cause, and that by reason of such improper action on his part she had been arrested and imprisoned. If the case had been closed at this point, the jury would have been constrained, in right reason, to find not only that the prosecution had been founded in falsehood, to the knowledge of the defendant, but that it was consequently malicious, and thus his liability would have ensued. In this posture of affairs the defendant could not controvert the fact that the charge that he had in point of fact sworn to was false and without foundation, but it was still open for him to disprove the inference that would have necessarily resulted from the admitted facts that he had put the law in motion against the plaintiff from a malicious motive. The existence of an illegal intention in this action was as essential to its support as were the falsity of the crimination and the absence of reasonable ground for a belief in its truth. In order to manifest a legal motive for his conduct, the offer was made to the effect that the charge that he had meant to make was one touching a different matter, and that such latter inculpation was true according to his belief. It will be observed that if that had been the true attitude of the defendant, that is, reasonably believing that the plaintiff had committed the crime of perjury in the particular sought to be shown, he had taken steps, in behalf of public justice, to call her to account,

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and in that course of law a mistake in the affidavit had supervened, it is clear that no matter how negligent he had been, his motive had not been illegal. Proof of the naked fact that one charge had been substituted for another would not, of itself, have been a defense to the action, because it would not have exhibited a legal motive for the defendant's conduct. It would have been consistent with such a state of proof that he had been actuated in the affair either by a legal or illegal inducement to the course taken. In order to test the principle, suppose the defendant had proved that he had intended to charge a crime upon the plaintiff, which he knew she had not committed, but that by mistake he had charged a different offense, and had caused her imprisonment for it, would such proof have been a defense to this action? Such a contention, very plainly, would not have availed. The defendant could not escape responsibility by the subterfuge that the unintended and not the intended falsehood had worked the plaintiff injury. On this side of the case the question is whether the defendant's motive was illegal with respect to the course of law leading to the arrest of the plaintiff, rather than to the particular mode of procedure that was adopted. No reason suggests itself why the doctrine should be made a part of the legal system that when a person has been subjected to the suffering and ignominy to which the plaintiff was subjected, such person is to be without redress, if through the inadvertence or negligence of the prosecution, a mistake has been fallen into with respect to the particular charge which it was intended to make, no matter how improper or vicious the purpose of such prosecutor may have been. As the case stood before the court below, it had appeared that the charge made was false; that there had been no reasonable cause for believing it to be true, and the conclusion is that unless the defendant could show that his motive for putting the prosecution on foot was not malicious, that is, was not such a motive as the law prohibited, the action was sustained.

There was error therefore in rejecting the testimony in question.

The second objection urged against the proceedings at the trial also arises from the exclusion of proofs offered by the defendant.

The defendant, desirous, apparently, to disparage the general reputation of the plaintiff in point of morals, asked of a witness the following question: "Do you know the reputation of Mrs. Frasier, in the city of Paterson?" This interrogatory in the form stated was overruled, the court directing the counsel to make the

inquiry more specific. The following interrogatories were then propounded and were successively overruled, to-wit: "Are you acquainted with the general reputation among her neighbors and acquaintances of the plaintiff?" "Do you know whether the plaintiff has been charged with crime prior to the complaint which Mr. O'Brien made against her?" "Are you acquainted with the general reputation which the plaintiff had amongst her friends and neighbors prior to the time that Mr. O'Brien made his charge against her?" "Do you know whether prior to the charge that Mr. O'Brien made against her, the defendant had obtained and acquired the good opinion and credit of her neighbors?" "Are you acquainted with the reputation which Mrs. Frasier had prior to Mr. O'Brien's charge against her for virtue?"

With respect to these inquiries two topics are discussed in the briefs of counsel, first, whether the general character of the plaintiff in this action was open to attack, and second, this being answered in the affirmative, whether the interrogatories or any of them, which were addressed to the witness, were in due form.

Touching the first subject, it is conceived that when a plaintiff in a suit for malicious prosecution founds his action in part on an injury done to his character by such prosecution, the legal rule is quite settled that he thereby puts his general character in issue. As long ago as the case of *Savile v. Roberts*, reported in 1 *Ld. Raym.* 374, Lord HOLT, in defining the damages which will support a suit of this character, states as his first class those instances where the only injury consists in the "damage done to a man's fame, as if the matter whereof he be accused be scandalous." It would seem to follow therefore that whenever the action is used as a means of reparation for an injury, in whole or in part, done to his character, the plaintiff in such procedure must stand in precisely the same attitude that the actor in an action for libel or slander assumes, and in the latter class of cases it has been adjudged in this court, that the general bad character of the plaintiff at the time of the alleged grievance is admissible on the part of the defense in mitigation of damages. The case indicated is that of *Sayre v. Sayre*, 1 *Dutch.* 235, in which Chief Justice GREEN reviews the English and American decisions on this subject, and finally declares the class of evidence in question is admissible, in mitigation of damages, on the broad ground "that it cannot be just that a man of infamous character should, for the

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same libellous matter, be entitled to equal damages with the man of unblemished reputation." It is also to be noted, in this connection that in his discussion of the subject the accurate jurist just mentioned, evidently considered the action for malicious prosecution based on an injury to character, as *in pari materia* with the action for libel or slander, and refers to both procedures throughout his opinion, as resting on the same general principle. And indeed it does not seem to be deniable that a malicious prosecution for an indictable and odious offense is a libel to which is in some cases superadded illegal imprisonment and the loss of property, so that it would be quite abnormal for the same court to declare that in the actions for libel the plaintiff's character is in issue, but in actions for malicious prosecutions it is not in issue.

And the decision just referred to appears to accord with the great weight of authority, as will plainly appear by a reference to any of the leading text-books treating of the subject. 1 Whart. Ev., § 54; *Bacon v. Towne*, 4 Cush. 217; *Fitzgibbon v. Brown*, 43 Me. 169.

Evidence as to the bad moral character of the plaintiff was, it is considered, plainly admissible in mitigation of damages. Whether such testimony would have been proper, if such issue had been presented on the facts as a circumstance going to make up a reasonable cause for the conduct of the defendant, is a question not now *sub judice*.

[Omitting other questions.]

Let the judgment be reversed on the grounds above defined.

Judgment reversed.

WELLER V. MCCORMICK.

(47 N. J. Law, 297.)

Negligence — fall of shade trees — liability of lot-owner.

Where a city, by authority of its charter, maintains shade trees on the sidewalks, the owner or occupant of a lot is not impliedly bound to trim them, nor liable for injury to a passer by the fall of a neglected rotten limb.

ACTION for personal injury by negligence. The opinion states the facts. The plaintiff had judgment below.

Chas. T. Cowenhoven, for plaintiff.

C. Adrian and *Alan H. Strong*, for defendant.

DIXON, J. On September 27, 1881, the defendant became the owner of a hotel on the corner of Somerset and George streets, in the city of New Brunswick, his title extending to the middle of the street. On the sidewalk of George street, in front of his premises, an elm tree was growing, and on January 21st, 1883, the plaintiff, while passing along the sidewalk, was injured by a limb that fell from the tree. The plaintiff sued the defendant for the damages so sustained, and recovered on the theory that the facts above stated created a duty on the part of the defendant to use proper care toward trimming the tree, so that travellers would not be endangered thereby.

Whether these circumstances give rise to such a duty is the first question discussed before us on the motion for a new trial.

It must be conceded that ordinarily, when a person, for his private ends, places or maintains, in or near a highway, any thing which, if neglected, will render the way unsafe for travel, he is bound to exercise due care to prevent its becoming dangerous. If therefore from the fact that the tree in question stood on a portion of George street owned by the defendant, it is to be inferred that the tree was placed or maintained there by him for his private benefit, it would follow that the alleged duty existed. But we think that in the present case this fact is not sufficient to warrant such an inference against the defendant.

Shade trees in the streets of a city are of public as well as private utility. They protect and ornament the way for public use, as they also do the adjoining property for private enjoyment. It is therefore clear that by virtue of the ordinary public right in highways, the public may plant and maintain shade trees therein. Whether the legislature, to whom this power primarily belongs, has in a given case delegated it to a subordinate, depends of course upon the terms by which authority is granted. In the charter of the city of New Brunswick the matter is not left in doubt. The instrument (Pamph. L., 1863, p. 347, § 31), gives the common council power to make, modify and repeal ordinances, rules, regulations and by-laws for directing and regulating the planting, rearing, trimming and preserving of ornamental shade trees in the streets, parks and

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grounds of the city. It thus appears that since 1863 the municipality has had the power of planting and preserving shade trees in the streets, and therefore the presence of any such tree in a street may be attributed to the exercise of this power as well as to any other cause. Under these circumstances the most that the plaintiff can properly claim to have proved is that the tree was planted or maintained either by the defendant for private purposes or by the city for public purposes. This is inadequate to the necessities of the plaintiff's position, for a plaintiff must show by a preponderance of evidence, not that either the defendant or some disconnected third party is responsible, but that the defendant is responsible.

The verdict therefore cannot be supported on an inference that the tree was planted or maintained by the defendant.

But if the tree was planted or maintained by the city, would the law then cast upon the defendant as owner or occupant of the abutting premises the duty of taking care that the tree should not endanger travellers?

At common law the duty of keeping highways safe for travel pertained ordinarily to the parish at large. *Rex v. Sheffield*, 2 T. R. 106. But since the traveller might, when the highway became unsafe, pass over the adjoining private property, the tenant of that property, if he chose to inclose it so as to exclude the traveller, became bound to keep the road in front of his premises repaired. *Sir Edward Dunscomb's case*, Cro. Car. 366; 2 Sm. Lead. Cas. (*Dovaston v. Payne*, note), *205. If this doctrine has been adopted in our jurisprudence, and is applicable in cities, it would seem to go far toward establishing the defendant's liability. For the case shows that the adjoining premises were used by him as a hotel, a use inconsistent with a right of free passage round a dangerous portion of the street. But I think the doctrine in question forms no part of our legal system. From very early times our State policy has encouraged the building of fences, and the people have been accustomed to inclose their lands along public roads. Yet the burden of maintaining highways has always been borne by the public with means raised under the taxing power, and no instance, I think, can be found in which either a private or a public prosecution has been sustained against an occupant of the adjoining inclosure for a mere omission to repair the road. It is now a well-settled principle that the expense of keeping and improving highways cannot

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be charged upon the owners of abutting lands, whether inclosed or not, merely because of their frontage, and this negatives the idea that the old English rule is in force among us.

A distinction however has been drawn between the road in general and the sidewalk. Probably in consideration of the peculiar privilege usually accorded to the owner of land to use the adjacent sidewalk for stoops, areas, shutes, and other domestic and trade conveniences, he has been held chargeable with the whole expense of maintaining this portion of the road. *Paxson v. Sweet*, 1 Green, 196; *State v. Newark*, 37 N. J. L. 415; *Kirkpatrick v. Commissioners*, 42 N. J. L. 510; *Robins v. New Brunswick*, 44 N. J. L. 116. Still even this liability has not been extended beyond the limits fixed by express legislation. No case has intimated that if the owner or occupant of the abutting premises had not in any way interfered with the side of the road, and had had no duty enjoined upon him in regard to it by statute or lawful municipal regulation, he was under an obligation to render it fit or safe for passage. Since the private duty is enforced mainly for public benefit, and seems to form an exception to the rule that public advantage should be secured at public cost, it ought not to be enlarged beyond the bounds already indicated.

My conclusion therefore is, that if the tree in question was planted or preserved by the city, the defendant owed no duty concerning it, except such as was imposed by the by-laws of the corporation. As no by-law was offered in evidence at the trial, the verdict cannot rest on this basis.

The rule to show cause should be made absolute, for want of proof that the defendant was bound to take care of the tree.

PATTERSON V. LIPPINCOTT.

(47 N. J. Law, 457.)

Infancy — contract by father for son.

No action lies against a father on a contract made by him in the name and behalf of his minor son with his knowledge and assent. (*See note, p. 182*)

ACTION on contract. The opinion states the case. The defendant had judgment below.

Patterson v. Lippincott.

J. J. Crandall, for prosecutor.

Slape & Stephany, for defendant.

SCUDDER, J. An action of debt was brought in the court for the trial of small causes by Jacob M. Patterson against Barclay Lippincott, to recover the balance, \$75, claimed under a contract in writing for the sale of the exclusive right to use, manufacture and sell the plaintiff's patent "air-heating attachment," in Atlantic county, New Jersey. The writing was signed "Geo. P. Lippincott, per Barclay Lippincott," on the part of the purchaser. The state of demand avers that by virtue of this agreement the plaintiff did in due form convey said patent right to said George P. Lippincott, that said George and Barclay, on request, have refused to pay said balance, and that, since payment became due, the plaintiff has found out and charges that said George is under the age of twenty-one years. He further avers that he never had any contract or negotiations with George, and that Barclay's warranty of authority to act for his minor son is broken, whereby an action has accrued to the plaintiff against the defendant.

The averment that the plaintiff never had any contract or negotiations with George is not sustained by the proof, for the testimony of Joseph N. Risley, the agent who made the sale, which is the only evidence on this point that appears in the case, is that the defendant told him he was going out of business and intended to transfer it to George; requested him to see George; he did so; talked with him; he looked at the patent; was satisfied with it, and talked with his father about buying it. The deed for the patent right in Atlantic county was drawn to George P. Lippincott. It is proved by the admission of the defendant, Barclay Lippincott, that at the time of such sale and transfer his son George was a minor. This admission is competent testimony in this suit against him.

A verdict of a jury was given for the plaintiff against the defendant in the court for the trial of small causes; and on the trial of the appeal in the Court of Common Pleas there was a judgment of nonsuit against the plaintiff. The reason for the nonsuit does not appear on the record, but the counsel have argued the cause before us on the case presented by the pleadings and proofs, the contention being here, as it was below, that the plaintiff

could not aver and show the infancy of George P. Lippincott, and bring this action against Barclay Lippincott, as principal in the contract, in contradiction of its express terms.

On the face of the written agreement George P. Lippincott is the principal and Barclay Lippincott the agent. The suit on the contract should therefore be against the principal named, and not against the agent, unless there be some legal cause shown to change the responsibility. The cause assigned by the plaintiff is the infancy of George at the time the agreement was made in his name by his father. The authority on which he bases his right of action is *Bay v. Cook*, 2 Zab. 343, which follows and quotes *Mott v. Hicks*, 1 Cow. 536, to the effect that if a person undertakes to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible; and the agent, when sued on such contract, can exonerate himself from the personal responsibility only by showing his authority to bind those for whom he has undertaken to act. *Bay v. Cook*, was an action against an overseer who had employed a physician to attend a sick pauper, without an order for relief under the provisions of the act concerning the poor. As his parol contract with the physician was entirely without authority to bind the township, it was said that he had only bound himself to pay for the services rendered at his request.

Later cases have held that an agent is not directly liable on an instrument he executes, without authority in another's name; that the remedy in such case is not on the contract, but that he may be sued either for breach of warranty or for deceit, according to the facts of the case. *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Baltzer v. Nicolay*, 53 N. Y. 467; *White v. Madison*, 26 N. Y. 117, and many other cases collected in the notes in Whart. on Agency, §§ 524, 532, and notes to *Thomson v. Davenport*, 9 B. & C. 78, in 2 Sm. Lead. Cas. 358 (Am. ed.). ANDREWS, J., in *Baltzer v. Nicolay*, *supra*, says: "The ground and form of the agent's liability in such a case has been the subject of discussion, and there are conflicting decisions upon the point; but the later and better-considered opinion seems to be, that his liability, when the contract is made in the name of his principal, rests upon an implied warranty of his authority to make it, and that the remedy is by an action for its breach."

Although the state of demand in the present case is uniformly

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drawn, there is in the last sentence a charge that the defendant's warranty of authority in pretending to act for said minor is broken, whereby an action has accrued. This alleged breach of an implied warranty is founded on the assumption that the son could not confer any authority during his minority to his father to act for him in the purchase of this patent right. There are two answers to this position. The act of an infant in making such contract as this, which may be for his benefit in transacting business, either directly or through the agency of another, is voidable only, and not absolutely void, and therefore there is no breach of the implied warranty unless there be proof showing that the act of the agent was entirely without the infant's knowledge or consent. The mere fact of the infancy of the principal will not constitute such breach.

It was argued in *Whiting v. Dutch*, 14 Mass. 457, that a promissory note signed by Dutch for his partner Green, who was a minor, was void as to Green, because he was not capable of communicating authority to Dutch to contract for him, and that being void, it was not the subject of a subsequent ratification. But the court held that it was voidable only, and having been ratified by the minor after he came of age, it was good against him. See Tyler Inf., ch. III, §§ 14, 18.

Another answer is that the defense of infancy to this contract with the plaintiff can only be set up by the infant himself, or those who legally represent him. Infancy is a personal privilege of which no one can take advantage but himself. *Voorhees v. Wait*, 3 Gr. 343; Tyler Inf., ch. IV, § 19; Bingham Inf. 49.

In this case the plaintiff seeks to disaffirm the infant's contract with him, in his own behalf, and sue a third party on the contract, whose authority to bind him the infant has not denied. The privilege of affirming or disaffirming the contract belongs to the infant alone, and the plaintiff cannot exercise it for him. The mere refusal to pay, charged in the demand and proved, is not a denial of the defendant's authority to bind the infant, for it may be based on the failure of consideration, the invalidity of the patent, fraudulent representations or other causes.

The judgment of nonsuit entered in the Court of Common Pleas will be affirmed.

Judgment affirmed.

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NOTE BY THE REPORTER.—In *Whitney v. Dutch*, *supra*. PARKER, C. J., said: "Then upon principle, what difference can there be between the ratification of a contract made by the infant himself, and one made by another acting under a parol authority from him?" In *Cummings v. Powell*, 8 Tex. 80, it is said: "It is a matter of great convenience, if not of absolute necessity, that sales should be effected by agents; and it seems quite preposterous that a sale by a minor which must necessarily, or may most conveniently, be made through the intervention of an attorney in fact, should be void, but if made by himself, would only be voidable."

FITZGERALD V. NEW BRUNSWICK.

(47 N. J. Law, 479.)

Constitutional law—general statute.

A statute prohibiting the removal of police officers in cities, for political reasons, or for other than certain prescribed causes, and prescribing a mode of trial for all officers, is general and valid.*

THE opinion states the facts.

W. P. Vorhees and *Alan H. Strong*, for prosecutors.

J. K. Rice and *C. T. Cowenhoven*, for defendants.

REED, J. On the evening of July 6, 1885, the common council of the city of New Brunswick, by a majority vote, declared that the offices of chief of police and of patrolmen in the city of New Brunswick were vacant. Afterward, on the same evening, a new chief of police and new patrolmen were voted for, and upon receiving a majority of votes were declared to be appointed to the places of the officers whose positions had recently been declared vacant.

This writ brings up these resolutions, and they are attacked on the ground that the common council had no power to so vacate and fill the respective offices.

It is admitted that no cause was assigned for the vacation of the offices, nor any hearing accorded to the officials previous to the passage of the resolutions. The proceedings were taken in asserting an absolute power of removal of the old force at the will of the appointing body. It is not denied that up to March 25, 1885,

* See note, 25 Am. Rep. 289.

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the power which was exercised by the common council was lodged in that body. The power of the common council previous to that date seems to have been defined by an ordinance passed in 1870, which provided that every person appointed under the provisions of the ordinance to establish and regulate the police department of the city of New Brunswick should continue in office until the office for which he shall have been appointed shall be declared vacant, or until another person shall be appointed to succeed him and shall enter upon the duties of his office. The action of the common council now before us was in strict compliance with the provisions of this ordinance.

On the 25th of March, 1885, an act was passed by the legislature which was designed, obviously, to restrict the theretofore unrestrained power of removal of officers or employees in the police departments of some cities.

The first section of this act provides that in the several cities of the State the officers and men employed by municipal authority in the police department of any city shall severally hold their respective offices, and continue in their respective employment as such municipal officers and employees, during good behavior, efficiency, and residence in such city, except where by statute the term of office of any such officer and employee is determined and fixed, and does not depend upon the pleasure of any municipal officer, officers or board authorized to make appointment or employment in said department.

It further provides that no person shall be removed for political reasons or for any other cause than incapacity, misconduct, non-residence or disobedience of just rules and regulations established for the police department of such city.

The fifth section of the act provides for the method in which charges shall be preferred against and the manner in which the trial of any police officer shall be conducted.

If this statute is not obnoxious to the criticisms of defendants' counsel directed against its constitutionality, it seems to cover the acts of the common council under review. The argument addressed to the court to the point that this is a general act, and so would not operate to repeal the provisions of the charter of New Brunswick upon this special matter, is not sound. Whenever the intent to repeal a special act by a general statute is apparent, the legislative intent will be effectuated.

It would be difficult to frame an act where the intent to reach and alter the provisions of all city charters in this respect could be more conspicuous than in the present statute. It in terms applies to all cities having policemen whose term of service is not fixed by statute. Upon this ground of objection to the operation of the act it is clear that the act is intended to repeal this provision in the charter of New Brunswick.

It is objected however that this act is unconstitutional, because it is a special statute regulating the internal affairs of cities. That it regulates the internal affairs of certain cities, among which is New Brunswick, is not a matter for contention. The ground of contest is in regard to the character of the statute as to the generality of its operation. The counsel for defendants contend that the act is a specimen of special legislation, and that its lack of generality consists, first in its failure to operate upon the police departments of all cities; and second, its failure to reach municipalities not cities, yet having police departments, the members of which were removable at pleasure.

First, then, does the failure of this legislation to operate upon the police departments of all cities fasten upon the act a special or local character?

The test of proper classification has been announced as a grouping of objects having characteristics sufficiently marked and distinguished to make them a class by themselves, having regard to the object of the legislation.

If we admit the contention of the counsel for the defendant, to be well grounded, namely, that it applies only to cities whose police officers hold their places at will, and apply that test to this legislation, it still appears to conform to the standard erected. The legislation applies to all cities whose internal affairs are such as permit the operation of the terms of this act. It is appropriate legislation in respect to those cities having police departments whose officers hold their terms of service at the will of the appointing body, and inappropriate to those cities whose policemen hold their places for a fixed term by authority of a statute.

Tested by the formula above stated the legislation seems entirely above criticism. I am not satisfied however that this rule can be regarded as a universal test of generality in legislation concerning the internal affairs of cities. In the case in which it was first announced it was clearly correct. It was in the case of *Van Riper v. Parsons*, 40 N. J. L. 123; s. o., 29 Am. Rep. 210. The act con-

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cerning which the rule was announced was one which repealed a feature of municipal government in Jersey City, which was peculiar to that city alone. The legislation destroyed a feature of municipal government which was anomalous in the affairs of the cities in this State, and so long as the act operated to extinguish it wherever it might exist it was general legislation, although but one city was touched by its operations.

It conserved the purpose of the constitutional provision, in that it tended to produce homogeneity of municipal government among the cities of the State.

The test can also be applied in all instances where the characteristics which segregate the cities into groups are the result of physical differences. I mean by this, differences in population, in location, or in the character of the industries carried on in each.

The illustrative instances in former opinions of what might be regarded as a grouping by characteristics are nearly all of this character. Examples of what might be regarded as general acts were mentioned *arguendo* in the opinions in the following cases. Thus a statute providing that all cities containing a population of over a certain number should have a given number of polling-places, and cities containing a lesser number should have a prescribed lesser number. *Van Riper v. Parsons*, 40 N. J. L. 1; s. c., 29 Am. Rep. 210. A statute giving to all cities bordering upon tide-water the power to construct docks or provide quarantine regulations, *Anderson v. Trenton*, 42 N. J. L. 486; or the privilege of using such tide-water in connection with their sewers. *State v. Hammer*, 42 N. J. L. 435. A statute legislating for cities only having a superintendent of wharves in regard to such. *Hammer v. State*, 44 N. J. L. 667. These are obvious instances of differences which result from physical causes, which the legislature cannot obliterate.

As legislation adapted to the needs of such cities as by reason of physical causes have distinctive legislative needs cannot reach all cities, therefore whenever it does reach all the cities which have the features which make such legislation appropriate, it is general.

In respect to cities divided by such peculiar features an appropriate grouping is not difficult. When we turn from cities which differ by reason of physical causes to those whose differences consist in diversities of municipal government merely, it seems to me a matter of difficulty to recognize the rules already announced as a test of generality in legislation.

At the time of the adoption of the constitutional amendments there were innumerable diversities in the features of the municipal government in different cities resulting from previous individual charters. There may have been several different methods of organizing a school board or a police board; as many methods of procedure; as many modes of appointing; of discharging; of paying teachers or policemen. One school board may have had power to furnish books for all the pupils in the public schools, another board power to supply indigent pupils only, and still another board no power to furnish books to any pupil. Now it is obvious that the creation of such diversities since the adoption of the present Constitution would be beyond the ability of the legislature. It would be impossible, for instance, for the legislature to create a board of education in one city which would have power of a certain scope, and in another city a board with authority of a different kind.

Now it seems to me that aside from repealing acts like that under consideration in *Van Riper v. Parsons, supra*, legislation which applies to a city which has no characteristic, or to more than one city each having no characteristic to distinguish it or them from all other cities, except such peculiarities of government as are created by previous local legislation, is not general legislation. And I think this is so even if the legislation appertains only to the changing or modification of the feature which marked the nine cities to which it applies as a group.

If one city only, for instance, has a school board with power to furnish books for children, I do not perceive why an act changing this power to one which gives authority to furnish books to indigent children, or *vice versa*, is a general act, because it applies to all cities with boards having power to purchase books. The classification is vicious, because it depends upon previous local legislation. The recognition of such local legislation by relying upon it as a foundation for new legislation which only changes, perpetuates or perhaps increases the previous local or special features created by special charters, is as inimical to the constitutional provision as if the last legislation created the diversity which it perpetuates. If all the special features of our city charters can be changed with only the feeble restriction that the statute which changes them it shall apply to any other city or cities which may happen to have similar features, then it will be a distant day when the homogeneity in the municipal governments of the State, which the consti-

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tutional amendment was designed to bring about, will be attained. My view is that any legislation touching any branch of municipal government which is common to all cities, must include all cities, or reduce all cities to uniformity in respect to the particular with which the legislation deals. Schools, police, poor, streets, are common to all cities; therefore any legislation which applies in any respect to one of these subjects must apply to all municipalities alike. An exception to this rule is admitted in the case of repealing acts like that in *Van Riper v. Parsons, supra*. The views above expressed seem to me to be fortified by the decision of this court and the Court of Errors and Appeals in the case of *State v. Hammer*, 42 N. J. L. 435; s. c., 44 N. J. L. 567.

The act under consideration was entitled "An act relating to the assessment and revision of taxes in cities of this State." It provided that in any city of this State where a board of assessment and revision of taxes now exist the board shall hereafter consist of four members.

The act then proceeded to remodel the constitution of the board in the two cities which alone had boards. The act it is perceived applied to the only cities which had this feature which existed by reason of previous local legislation, and it appertained to the modification or alteration of that feature which distinguished these cities from the rest. Yet the act was held to be special, the chancellor remarking: "How does the fact that taxes are assessed by a board of assessors in one or more municipalities constitute such a difference between those municipalities and the others where the taxes are assessed by individual assessors, as to warrant the legislature in specially interfering in the affairs of the former to such an extent as it has attempted to do in the legislation under consideration?"

Now turning again to the statute under consideration we find the opening clause of the first section recognizing two classes of police officers, namely the class which hold their terms determined and fixed by statute, and the class whose term depends upon the pleasure of any municipal officer or officers, or board authorized to make appointment or employment in a police department, and it legislates for the latter class exclusively.

Inasmuch as in the view already expressed all policemen are included within a class, therefore if this clause stood alone it would in my judgment be a specimen of special legislation.

But it is urged that this language can be disregarded, and that the remaining portion of this section, as well as all of the following sections of the act, applies to all policemen, or reduces the condition of all policemen in respect to the subject matter of the legislation to a uniform *status*. In looking at this portion of the act the generality of the application of the words must be admitted.

The concluding part of section 1 provides that no person shall be removed from office or employment in the police department of any city for political reasons, or for any other cause than incapacity, misconduct, etc.

The fifth section regulates the course or procedure against any officer of any department, and the other sections are equally comprehensive in their provisions.

Now although there are cities in which the duration of the terms of police officers seems to be limited by charter provisions, yet I think there is no city in which the power of removal of such officers in some shape does not exist, and I am sure there is no city in which it may not exist. It may exist in some cities at the will of some municipal officer or body of officers, in other cities for some specified causes, and in yet other cities for still other causes.

For the trial of the officers where the removal is for cause, the proceedings may be as variant as the cities are numerous. The present act in respect to the cause for which removal shall be made, and the method of procedure by which it shall be effected, reduce all cities to uniformity, and applies to all policemen and to all departments. In this aspect the legislation is general.

It is secondly objected that the act does not apply to municipalities other than cities. It is remarked that there exist in the State some municipalities which, under the name of boroughs, have populations as great and interests as important as some municipalities incorporated under the name of cities. That in the charters of the former are clauses almost or entirely identical with that of the city of New Brunswick, and other cities of the State, in regard to the organization and control of the police department. This all appears to be true. It is therefrom argued that a classification which includes only cities is not valid in respect to legislation concerning a subject like this, which is common to both cities and boroughs. Could the point involved in this contention be now regarded as open for discussion, untrammelled by previous judgments, it would pre-

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sent, in my opinion, a question not easily resolved in favor of the classification. But the recognition of cities as a class for legislative purposes in respect to other subjects, as obviously common to both cities and boroughs as this, seems to have been too frequent to be now disregarded in this court.

No subject would seem to be of more general and uniform importance to both cities and boroughs than that of assessments for local improvements. Yet the recognition of the validity of statutes in regard to this subject, applying alone to cities, has been frequent. *State v. Jersey City*, 41 N. J. L. 487; *Mayor, etc., v. Green*, 42 N. J. L. 627; *Turrell v. Elizabeth*, 43 N. J. L. 272; *Mayor of Jersey City v. Carson*, 43 N. J. L. 664; *Righter v. Newark*, 45 N. J. L. 104.

So the power to construct sewers, and assess property-owners for the same, is common to some, if not all, boroughs as well as cities, yet the act of 1878, p. 344, entitled "An act respecting assessments for constructing sewers or continuations of sewers, running through adjoining cities," was held to be general in its application. *Green v. Hotaling*, 44 N. J. L. 347.

Again, an act passed in 1881 provided that any officer in any city in this State who holds any office for a fixed term should continue to hold such office until his successor has been qualified.

Officers of the same class, and with the same fixity of terms, are as common to boroughs as to cities, yet the act was held valid. *Stirling v. Davis*, 45 N. J. L. 390.

The case of *Hightstown v. Glenn*, 47 N. J. L. 105, cited in opposition to the view that the present act is general, did not necessarily involve the question whether cities and boroughs were within one class for the purpose of legislation concerning the granting of tavern licenses.

The act there under review was based upon an arbitrary classification of different boroughs, and applied to boroughs of the third class alone. For this reason the act was clearly special.

The opinion placed the vice of the legislation upon the ground that it was based upon population alone, and did not hold that a class which included all cities, or all boroughs, was not general.

In view of the array of cases in which classification similar to this has been already recognized, I am constrained to regard the present as a general act.

There is also a question raised in regard to the propriety of the use of the writ of *certiorari* in this case, inasmuch as the resolu-

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tions brought up appertained to an office, and so this writ involved the right to such office. The contention was that *quo warranto* was the appropriate writ.

I think this case is entirely within the rule laid down in the case of *Brulshaw v. City Council of Camden*, 39 N. J. L. 416.

My conclusion is that the resolutions must be vacated.

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(47 N. J. Law, 402.)

Mortgage — on chattels — sale of mortgagor's interest on execution.

The interest of a mortgagor in mortgaged chattels in possession of the mortgagee may be levied upon under execution, but they cannot be taken from the mortgagee without an offer to pay the mortgage debt.

The officer may advertise the interest of the mortgagor for sale, and on the day of sale he may require the mortgagee to expose the property to the view of bidders, and enforce obedience to that duty on the part of the mortgagee by virtue of his writ.

If a sheriff with notice of the mortgagee's claim attaches the entire mortgaged property, and takes it from the mortgagee, and it is subsequently sold by the auditor in attachment, the sheriff is liable to the mortgagee for the mortgage debt.

IN error to the Supreme Court. The opinion states the case.

Flavel McGee, for plaintiff in error.

William Brinkerhoff, for defendant in error.

VAN SYCKEL, J. Fox, the plaintiff, held in pledge fifty-nine head of cattle to secure the sum of \$4,000, due to him from one Blumenthal, the owner of the cattle.

While these cattle were in the possession of Fox another creditor of Blumenthal caused an attachment to be issued against him, directed to Cronan, the sheriff of Hudson county.

The writ of attachment was placed by the sheriff in the hands of Martin, his special deputy, to be served. When Martin served the writ notice was given to him of the claim of Fox upon the cattle. The sheriff took a bond of indemnity from the plaintiff in

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attachment, and took possession and held the cattle under said writ. In his return to the writ he certified that he had attached the fifty-nine cattle, appraised at \$23 each, without making any reference to the claim of Fox, the pledgee. The writ was served on the evening of August 8, 1882, and on the next day an auditor was appointed in the attachment proceeding, and the sheriff put the cattle in the possession of the auditor on the same day.

Thereupon Fox, the pledgee, brought suit against the sheriff to recover his damages for the taking of the cattle from him.

The first question presented by the case is whether a sheriff, by virtue of an execution or attachment in his hands against the pledgor or mortgagor of personal chattels, can remove them from the actual custody of the pledgee or mortgagee, and hold possession of them without paying or offering to pay the debt for which they were pledged.

It is conceded that while the mortgagor retains possession of goods they may lawfully be seized by virtue of an execution against him, and his interest in them sold to satisfy the judgment debt.

Woodside v. Adams, 40 N. J. L. 417, is relied upon to support the more advanced doctrine that the goods may be taken out of the possession of the pledgee or mortgagee by the officer under the authority of a writ against the pledgor or mortgagor.

In that case the property involved consisted of furniture in a hotel. The mortgagee took possession of it on the 22d of August, but did not remove the goods—he merely inventoried, appraised and advertised them for sale on the 6th of September then next.

On the 4th of September a landlord's warrant was delivered to the defendant, and executed by him by a levy on the furniture. The defendant did not remove or sell them before the replevin was sued out. The Supreme Court, in a very able opinion, in the conclusions of which, as applied to the facts of that case, I fully concur, held that replevin would not lie by the mortgagee.

The court said that nothing whatever had been done by the defendant, so far as disclosed by the case, which interfered with the plaintiff's rights under the mortgage—that the plaintiff might have proceeded with his sale under the mortgage without any interference or embarrassment consequent upon the execution of the distress warrant, leaving to the landlord the surplus goods that remained after the mortgage debt was satisfied.

The rule formulated by the court “permitted the officer to take

such possession only as would enable him to make a legal sale under his execution," and the court said that this would be consonant with public policy and consistent with sound legal principles, provided that in doing so no substantial injury be done to the interests of the mortgagee.

With this limitation upon the right of the sheriff to interfere with the estate and possession of the mortgagee, the doctrine announced in *Woodside v. Adams* will not be controverted.

But I cannot agree to the proposition that under authority of a *fi. fa.*, or an attachment, an officer can wrest personal property from a pledgee or mortgagee in possession, and withhold it from him until it is sold under the legal process. Such a rule would be contrary to sound principle, and is without authority to support it. The mortgagee is entitled to the possession; it is an essential part of his estate in the goods, without which he would be unable to exercise the right with which the law invests him, to sell the property for the satisfaction of his mortgage debt. He has a right, within reasonable limits, to select the time and place of sale, and to impose the conditions. This may be of vital importance to the recovery of his demand. He can neither be deprived of this right which is vested in him, nor postponed in the enjoyment of it.

The mortgagor could not deprive him of his possession. The sheriff or creditor who succeeds by operation of law to his rights can be in no better position than the mortgagor himself. He may take for the satisfaction of the judgment debt the interest of the mortgagor, but he cannot impair the estate of the prior for the benefit of the subsequent creditor.

The right of the sheriff to take the goods from the actual possession of the mortgagee imports the right to maintain and withhold the possession until he is required to sell them by the exigency of his writ. It frequently occurs that a stay of execution is ordered pending further litigation after a levy is made.

During all this period the mortgagee might be deprived of his possession, while interest upon his debt would accumulate and the value of his security become impaired. For the consequent injury he would be remediless, if it be conceded that the sheriff may lawfully assert his right to the actual possession.

A further consequence would be that if after sale under the execution the officer failed to subject the goods to the power of the mortgagee to resume possession, he would be guilty of a tort, for

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which he alone and not his sureties would be responsible. For the trespass of the officer the bondsmen are not held. The officer might be without pecuniary ability to respond in damages.

The transfer of the title subject to the mortgage by the act of the mortgagor cannot enlarge his estate, nor can it diminish that previously granted to the mortgagee. Who will assert that such vendee can legally maintain the right to deprive the mortgagee of his possession, and how can he who holds under the legal process be on a better footing? The recognition of this right in the latter would as clearly appropriate the property of the mortgagee to pay the debt of another, for which he was in nowise responsible, as would the former.

It is true that there is a line of English cases holding that the interest of one of several partners or joint owners of personal property may be seized and sold under execution, but such partner has an equal right to present possession with all his associates. Under such sale the purchaser can acquire only the share of the execution debtor in the surplus of the partnership effects, after the firm obligations are discharged. He becomes a tenant in common with the other partners, and takes *cum onere*.

The English doctrine of the right to levy was recognized in this State in *Brown v. Bissett*, 1 Zab. 46, but Mr. Justice CARPENTER, in delivering the opinion of the Supreme Court, took the precaution to say that "it was not a question as to the mode of levy in such case, and that it was not necessary to settle whether the sheriff may take the joint property out of the hands of the other partners on an attachment against one for his separate debt."

If the mortgagor's interest in mortgaged chattels in the lawful possession of the mortgagee cannot be appropriated to the payment of an execution without asserting the right of the sheriff to take actual possession, then I would unhesitatingly say that the mortgagor's title is not the subject of levy and sale under a *fi. fa.*

This is the rule in New York and in some of the other States where the subject is not regulated by statute.

No justification can be found for stripping the mortgagee of contract rights of which he is in the enjoyment, in order to establish a subsequent creditor, who can justly succeed to nothing more than his debtor has, in a better position than the debtor himself occupies.

In my judgment the interest of the mortgagor of personal prop-

erty in possession of the mortgagee can be transferred by levy and sale under execution without impairing the rights of the mortgagee.

The rule of the common law, that a levy under execution imports an actual taking into the possession of the sheriff, and that to constitute a valid levy the property levied upon must be in the manucaption of the officer, would interpose an insuperable obstacle in the way of subjecting the mortgagor's estate to execution and levy where the mortgagee is in possession. Under the settled law of this State the necessity of thus trenching upon the vested rights of the mortgagee is obviated.

Not only is the sheriff not bound to take into actual possession, or to remove goods levied upon, but he may make a valid levy from an inventory furnished by the defendant without seeing the property. He may therefore levy upon the right, title and interest of the mortgagor, and his constructive possession of that interest will be consistent with the actual, continued possession of the goods by the mortgagee.

Under such levy the officer may advertise the interest of the mortgagor in the property for sale, and on the day of the sale he may require the mortgagee to expose the goods to the view of bidders, and enforce obedience to that duty on the part of the mortgagee by virtue of his execution and levy.

This will not necessitate the removal of the property from the possession and control of the mortgagee, nor deprive him of any substantial right.

The right to levy imports a right to see the goods. The mortgagor would have that right, if he wished to show the property to one who desired to buy subject to the lien of the mortgage. Otherwise the right to sell would in most cases be futile. The denial of this right would deprive him of the beneficial use of his property, and its refusal would constitute a conversion of his interest by the mortgagee, for which he might maintain an action against him, and recover the value of the goods in excess of the debt for which they were in pledge. The sheriff, armed with a writ of execution or attachment, would logically succeed to the same right, to enable him to make an appraisalment of the debtor's interest, and a sale thereof in obedience to the command of the writ or the order of the court.

The right of the sheriff to require the mortgagee to permit him to expose the chattels to sale must be incident to that he has to see

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them for the purpose of making a levy, and his process must be as potent to enforce the one right as the other. This would involve no disturbance of the mortgagee's possession.

To the suggestion that a writ of attachment could not be made available against the interest of the mortgagor in goods in possession of a non-resident mortgagee in transit across the State before they passed out of our jurisdiction, the answer is two-fold.

1st. There would be manifest injustice in constraining the non-resident mortgagee who has the prior and paramount right to leave his property in charge of a forum which may be remote from his domicile for the benefit of a creditor who can take only subject to his title unless the mortgaged debt is tendered.

2d. If the attaching creditor desires the sheriff to take actual possession of the property he must pay or offer to pay the mortgage debt.

If there is a well grounded apprehension that a resident mortgagee may remove the goods beyond the jurisdiction in which they are seized, he may be enjoined at the instance of the subsequent creditor. Such unlawful removal may constitute a conversion on the part of the mortgagee for which he would be liable to the sheriff in an action of trover.

Such is the doctrine that prevails in the Pennsylvania courts.

In *Srodes v. Caven*, 3 Watts, 258, the court said that "goods pawned or gaged for a debt or leased for years cannot be taken in execution, but the sheriff may sell the goods pawned or leased subject to the rights of the lessee or pawnee. But although the sheriff has the right to sell, he cannot seize them, because the pawner or lessor has no present right to possession. It is reasonable that whatever interest the debtor himself may sell the sheriff may sell, although it may not be capable of actual seizure and delivery."

The language of Mr. Justice STRONG in *Welsh v. Bell*, 32 Penn. St. 12, is to the same effect: "The sheriff may levy upon and sell the interest of the debtor in personal property, although the immediate possession and right to it be in another. If the debtor have bailed or demised the goods this interest may be seized and sold, subject however to the rights of the bailee or lessee. But the possession of the latter may not be disturbed. The levy can only be on the interest of the debtor. A levy upon the thing itself disturbs the possession, and is a trespass.

In no mode other than that here indicated can the right of the

mortgagor in mortgaged chattels in possession of the mortgagee be made the subject of levy and sale under execution or attachment, without substantially impairing the rights of the mortgagee, which *Woodside v. Adams* concedes it is unlawful to do.

Public policy as well as sound reason manifestly requires that the power of the officer over mortgaged goods in such case shall take no wider range.

Conspicuous injustice will result in many instances if personal chattels may be taken by legal process from one who has the rightful exclusive possession, in order to enforce payment of the debt of another.

The interest of the lessor in goods demised for a term unquestionably is and should be subject to levy and sale under execution, but the right of the sheriff to withhold the leased property from the possession of the lessor cannot be admitted.

Suppose a line of stages be in possession of the lessee for a term unexpired, can the officer, armed with an execution against the lessor, seize the horses and vehicle and retain them until sale? If so, the lessee is deprived of his property, which consists in the right to the uninterrupted use during the full term for which he holds it.

Deprivation of possession is *pro tanto* destruction of his estate. For such deprivation, if the sheriff may lawfully take possession, the lessee is without remedy. Such a doctrine cannot be permitted to prevail without a misconception of correct legal principles.

The sheriff in this case in my judgment became a trespasser by attaching the cattle and turning them over to the auditor.

There is also another ground upon which the pledgee can clearly support his action.

The sheriff attached, not the interest of the pledgor in the cattle, but the cattle themselves, the interest of the pledgee as well as the interest of the pledgor.

Notwithstanding the notice to his deputy of the pledgee's claim, he took a bond of indemnity from the attaching creditor, levied on the cattle and certified to the court in his return to the writ of attachment that he had levied on the cattle without intimating that the pledgee had any interest in them, and then turned them over to the auditor.

Thereupon the court ordered the auditor to sell the cattle, as if the title of the pledgee was absolute. The order could not, under the return of the sheriff, have been made otherwise.

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The auditor sold, in pursuance of the order of the court, the entire property. The sheriff, by the exigency of his writ, was commanded to attach the property of the defendant in attachment, and if by mistake he attached the property of the plaintiff in error, he was a trespasser.

The auditor in attachment was the mere arm of the court to execute its order to sell specific property, and for so doing he is no more liable to respond in damages to the true owner than the judge who made the order, or a sheriff who executes a writ of replevin.

The mortgagee must look to the sheriff, who wrongfully subjected his estate in the cattle to the process of attachment for the debt of the mortgagor; the sheriff is a trespasser, and he must respond in damages. The sale by the auditor did not divest the mortgagee of his title, and although he might have regained his property from the purchaser at the attachment sale, that fact constitutes no defense to the trespass committed by the officer, and cannot defeat the plaintiff's right of action against him.

The judgment of nonsuit was erroneous, and should be reversed.

For affirmance—CHIEF JUSTICE DEPUE, SCUDDER, COLE, PATERSON.

For reversal—CHANCELLOR, DIXON, MAGIE, REED, VAN SYCKEL, BROWN, CLEMENT, MCGREGOR, WHITTAKER.

HIBERNIA RAILROAD COMPANY V. DE CAMP.

(47 N. J. Law, 512.)

Eminent domain — condemning temporary use.

A railway company, authorized to condemn lands for a right of way, cannot condemn a temporary use, nor a use contingent on the happening of a future event.

ERROR to the Supreme Court. Proceedings to condemn lands for a right of way. The opinion states the case.

Henry C. Pitney and Mahlon Pitney, for plaintiff in error.

Cortlandt Parker and Alfred Mills, for defendant in error.

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DIXON, J. This writ of error brings up a judgment of the Supreme Court setting aside an order appointing commissioners to appraise certain property which the Hibernia Underground Railroad Company seeks to condemn.

The company was organized under the general railroad act and its supplements, for the purpose (as its articles of association state) of purchasing, operating and maintaining a certain railroad already constructed, running about two-thirds of a mile, wholly underground, through the Hibernia vein of iron ore in Morris county, to be used for the transportation of minerals, and of materials, implements and machinery for the sinking and working of mines. This railroad having been purchased, the company finds that the only right to maintain the same, on what is called the "De Camp mine lot," is derived from a lease which expires in 1894, and the proceedings now before us were instituted with the view of acquiring the right of perpetually maintaining the road across this lot, about ten chains in length.

The company's petition describes the property to be condemned (so far as the description is pertinent to the present inquiry) in the following language: "The right to perpetually maintain and operate the Hibernia Underground railroad as at present constructed and operated, being a railroad with a single track of the gauge or breadth of two feet and nine inches between the rails, and operated by steam locomotives and cars not exceeding six feet and six inches in breadth and eight feet in height, in, through and along that portion of the Hibernia tunnel * * * known as the 'De Camp mine lot.' * * * The center line of said railroad, where it crosses said 'De Camp mine lot,' is described as follows: Beginning, etc. * * * Also the right to repair, renew and alter said railroad as occasion may require. Including the right, for the purposes aforesaid, to enter upon and occupy so much of said tunnel as lies within four feet of said center line on each side thereof. * * * These proceedings are not intended to acquire any right or easement of support for the tracks or road-bed of said railroad by the ores lying beneath said tracks and road-bed, but the present and future owners of said 'De Camp mine lot' are to be at liberty, after reasonable notice to said Hibernia Underground Railroad Company or their successors or assigns, to mine and remove all or any part of the ores lying beneath said road-bed, notwithstanding the removal thereof may weaken or destroy the support of said road-

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bed. And further, in case at any time the support of said road-bed shall happen to be destroyed or materially weakened by reason of the removal in whole or in part of the ores lying beneath the same, then and in such case the said Hibernia Underground Railroad Company and its successors and assigns are to have the right to support said road-bed by timbering placed across said tunnel or by other means, or to make an excavation in the south-easterly or hanging-wall of said vein, for the purpose of providing a road-bed for said railroad; such excavation not to exceed the breadth of eight feet, measured from the face of said hanging-wall, and the height of eight feet, and to extend along said hanging-wall across said lot of land at the same level as the present floor of said tunnel."

One question raised by the land-owners is whether the rights thus defined were such as the company could lawfully condemn, and the decision of this question against the company in the Supreme Court is the matter now complained of as error.

The specific authority which the company aims to put in force is conferred by a supplement to the general railroad act, approved March 12, 1879 (Pamph. L. 166), under which the company was organized. This supplement enacts that "When any corporation formed under the provisions of this act shall take legal proceedings to acquire the right of way for its proposed railroad beneath the surface of the earth, such right of way shall not include the right to permanently use or occupy the surface of the earth immediately above such railroad and where the same is not broken, but shall be confined to a mere right to tunnel and excavate the earth for its tracks," and if the company has purchased a railroad already constructed, but has not acquired the right to maintain the same from the owners of the fee-simple of any lands upon, under or through which it is built, then "it shall be lawful for the corporation owning and operating said railroad to take and prosecute all such legal proceedings, to acquire the right to maintain and operate its said railroad, that it would have the right to take and prosecute if such railroad had not as yet been built." The supplement also declares that companies formed under it shall have all the powers, and may exercise all the franchises conferred upon, and which may be exercised by corporations formed under the original act; but we do not think that these general expressions can enlarge the scope of the special authority granted by the supplement for the condemnation of a right of way beneath the surface of the earth. In designating

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the rights which the company was to obtain under this special authority, the language used is so explicit as to prevent any inference gathered from general terms; it not only indicates what shall not be acquired, but also expressly declares to what the acquisition shall be confined.

We deem it clear that corporations formed to construct or maintain underground railroads are not entitled to condemn the fee-simple of lands for their right of way. What they can acquire is a right to tunnel and excavate the earth, a right to maintain and operate the railroad. We need not examine or cite the many cases which have held that terms much more indicative of a fee, when used in a grant of eminent domain, import only an easement. All the decisions agree in laying down these principles, that the corporation can take what the legislature has authorized it to condemn, and nothing more, that the authority must be expressly granted or necessarily implied in the express grant, and that it must be strictly pursued. Under these principles, the phraseology used in the statute cannot mean ownership of the land; it must mean only a right to construct, operate and maintain a railroad upon, through and under the land of another.

The petition therefore is correct in asking the condemnation, not of land, but of the right to maintain and operate the railroad. This right however, when acquired, would be paramount, and the land-owner could lawfully do nothing which would impair it. He might make any use of his land consistent with the maintenance and operation of the railroad; as owner of the ores beneath the road-bed, he might remove them, but always subject to this, that he should not weaken the road or materially interfere with the convenience of its operation. This would be the legal consequence of the condemnation by the company of a right to permanently maintain and operate the railroad as constructed. The petition however seeks to avoid this consequence, and to reserve to the land-owner the absolute right of removing the ore at his pleasure, without regard to the structure resting upon it. In other words, instead of the permanent right to support the railroad in its present position, which the statute expressly authorizes the company to condemn, the company proposes to take only a temporary privilege of support, until the land-owner shall see fit to remove the ore. Thus we are brought to the question whether the express grant of power to condemn the permanent use implies an authority to condemn a tem-

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porary use. A somewhat similar question was answered affirmatively by Chancellor KENT in *Jerome v. Ross*, 7 Johns. Ch. 315. There the canal commissioners had express authority to enter upon, take possession of and use any lands, waters and streams necessary for the prosecution of the improvement, doing no unnecessary damage, and it was insisted that the power could be exercised only for the permanent appropriation of the whole fee; but the court held that the commissioners were not obliged to appropriate a greater interest than was requisite for the public object, and that they might take possession of and use land, temporarily, for the purpose of quarrying stone with which to build a dam required by the canal. This view seems to have been subsequently sanctioned by the Court of Errors in *Lyon v. Jerome*, 26 Wend. 485. On the other hand, in *Currier v. M. & C. R. Co.*, 11 Ohio St. 228, where under an ordinary power to take land for the construction and operation of a railroad, the company sought to condemn a right of way, already occupied by it, for three years, to be used while its permanent road was building, the court said: "The road contemplated by the charter is a permanent thing; the lands to be taken for it, it is evident, were designed to be taken permanently, once for all. No such thing as a temporary appropriation of land is in the charter, expressly mentioned, nor does it anywhere seem to have entered the mind of the legislature. * * * We think that by no fair, and much less by any strict construction of the powers granted to this corporation, can the appropriation claimed be brought within them."

It is noticeable that the New York cases differ from the one before us in several respects. The right of temporary appropriation was there conceded, because for the purpose in view, that only was necessary to carry out the legislative design. But here the legislative design, as gathered from the statute and the company's articles of association, will apparently not be satisfied by the maintenance of the railroad, simply until the land-owner shall choose to remove the ore in the road-bed, and the petition itself, in recognition of this fact, seeks to substitute another road, when the existing site shall be destroyed, in order to accomplish fully the object of the incorporation. So that this ground, relied on by Chancellor KENT, for inferring a right to temporary occupation, is wanting in the present instance. In the case of the canal commissioners, also the right required was reasonably definite, as to both duration and use; pos-

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session until stone could be quarried sufficient for the building of a certain dam; so that a fair appraisal of the right was practicable, especially in view of the fact that the appraisal could legally be postponed until the use was ended. But here compensation must be made before possession is taken, and the appraisers must therefore say in advance what a right of possession is fairly worth, when the possession can lawfully be forthwith terminated by him to whom the compensation has been paid. Such an appraisement would, in most cases, be a mere guess, and rarely could result in the ascertainment of just compensation, which is a constitutional prerequisite to the condemnation of property by individuals and private corporations.

I cannot therefore rid my mind of grave doubts whether the legislature has authorized the taking of such a limited privilege in the present site of the railroad, as the petitioner demands, and because of these doubts must deny that the power has been granted.

But the petition does not stop at the existing road-bed. Conceiving that the needs of the company may outlast the willingness of the land-owner to leave the ore for the maintenance of the superstructure, it prays the condemnation of a further right, in the event of the removal of the ore, to support its tracks upon other property of the owner, and not this only but a right to choose, in the event indicated, whether that support shall be secured by timbers resting on both walls of the vein, or by excavating the hanging-wall to a depth of eight feet from its face. Thus it aims to carve out a sort of future contingent right in each of two distinct parcels of land now held in fee-simple, and to acquire the option of determining hereafter which of those rights it will eventually appropriate.

This is plainly going beyond any power conferred by the statute. That a contingent estate already existing may be condemned under the law, I see no sufficient reason to dispute, for such a power seems to be necessary to enable the company, when an estate of that nature is outstanding, to acquire what the statute says it may acquire, a right to permanently maintain an existing road; but that is a very different thing from a power to create such a contingent interest in order to condemn it, to the end that the company may in a possible event construct a different road on other lands. Such a power is not expressed in the statute or necessarily implied by

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any thing which is expressed, nor have we found any decision tending to uphold it under an ordinary grant of eminent domain. In our opinion, the language of the statute imports only the acquisition of present rights and of whatever may be necessary to make those rights perpetual.

For these reasons the judgment of the Supreme Court must be affirmed.

Judgment affirmed.

For affirmance—THE CHANCELLOR, DIXON, KNAPP, REED, VAN SYCKEL, BROWN, CLEMENT, MCGREGOR, PATTERSON, WHITAKER.

For reversal—None.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CONKLING V. RIDGELY & Co.

(112 Ill. 33.)

Statute — "vacation."

An adjournment of court for thirty-two days is to be regarded as "vacation."

THE opinion states the case.

Jas. C. Conkling, for plaintiff in error.

Palmer, Robinson & Shutt, for defendant in error.

SHELDON, J. This was a motion in the Circuit Court to set aside a judgment by confession in favor of N. H. Ridgely & Co., against Kimber, Ragsdale & Co., before the clerk of the Circuit Court of Sangamon county, Illinois, as of vacation. The regular term of the Sangamon county Circuit Court commenced October 2, 1882, when the court convened and continued to transact business until December 27, 1882, at which time an order was entered adjourning the court to January 29, 1883, at which date the court again opened and transacted business until February 3, 1883, when it adjourned *sine die*. On January 12, 1883, Kimber, Rags-

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dale & Co., by their attorney, appeared before the clerk of the said Circuit Court and confessed a judgment in favor of N. H. Ridgely & Co., for the sum of \$36,319.89, upon certain promissory notes, for which sum judgment was accordingly entered, upon which an execution was afterward issued. On the 29th day of January, 1883, the assignee of Kimber, Ragsdale & Co., under a voluntary assignment, entered his motion in said court to set aside the judgment and vacate the execution, which motion the court overruled. On appeal to the Appellate Court for the third district, the judgment overruling said motion was affirmed, and the assignee appealed to this court.

The chief question presented upon this record is, whether in this case the 12th day of January, 1883 -- the day this judgment by confession was entered -- was in term time or in vacation, within the meaning of our statute authorizing the entry of judgments by confession in vacation. Judgments by confession can be entered before the clerk only in vacation. During term time they must be entered in open court. The judgment here was entered before the clerk as in vacation. But it is contended by plaintiff in error that it was not in vacation when the judgment was entered, but that the 12th day of January, 1883, the time the judgment was confessed and entered, was a day in term time; that it was part of the preceding October term, which commenced on October 2, 1882, and was not adjourned *sine die* until the 3d day of February, 1883, and that not having been taken in open court, the judgment was null and void. No doubt an application of the strict common-law definition which we find of the term "vacation," to-wit, "a vacation is all the time between the end of one term and the beginning of another" (6 Jacobs' Law Dic. 323), would make the time of the entering of this judgment not to be in vacation, as the October term, which commenced on October 2, 1882, did not end by final adjournment until February 3, 1883. The inquiry is, whether we must adopt this as the meaning of the word "vacation," in the construction of the 66th section of the Practice Act, authorizing the confession of judgments in vacation.

We think that under this act the term "vacation" may well be given a different meaning from what it had at common law as above given. Under the earlier organization of courts in England, "terms" of the courts were four periods in each year. They commenced on fixed days and had a fixed time of termination, and

they aggregated ninety-one days. The vacations embraced all the days in the year not included in the "terms." Any such a period of recess of a court of more than a month's duration, as we find in this case, was unknown in that system. The early laws of this State, prior to December 9, 1871, provided for dividing the State into judicial circuits, and fixed the times for the commencement of the terms of the Circuit Courts in each county. In no case did the statutes in express terms fix the duration of the terms of such courts, though as the judges were required to hold terms in the different counties on fixed days, and had no authority to hold court in one county at a time the law required them to hold court in another, and only one term of a Circuit Court could be held or be open at any one time in a circuit, it followed as a necessary construction of the statute, that upon the occurrence of the time fixed by law for the opening of the court in any one county in a circuit, the Circuit Courts in every other county stood adjourned until court in course. *Archer v. Ross*, 2 Scam. 303. In *Cook v. Skelton*, 20 Ill. 107; s. c., 71 Am. Dec. 250, it was recognized that "the custom has always prevailed of adjourning from day to day, and for such other short periods as the convenience of the court and the despatch of business might require." By the first section of the "Act to provide for holding regular and special terms of the Circuit Court in two or more counties in the same circuit at the same time," approved December 9, 1879, it was provided that terms of the Circuit Court might be held in two or more counties in the same circuit at the same time, and that it should not be necessary to close any term in any county before the business of that term was disposed of, in order to begin a term in any other county in the same circuit, if any Circuit judge of the State could be had to preside over either of said terms. The 18th section of the act of February 22, 1872, conferred upon the Circuit Courts, when in session, the power to adjourn to any day not beyond the first day of the next term of the court in that county fixed by law. The effect of the statutes was to change the law in respect to the peremptory adjournment made necessary by the laws in force before, and to leave the duration of the terms of the courts practically at the discretion of the judges. By the 27th section of chapter 83 of the Revised Statutes of 1845, it was provided that "any person, for a debt *bona fide* due, may confess judgment by himself, or attorney duly authorized, with or without process."

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Thus stood the general law upon this subject until the passage of the act in regard to practice in courts of record, approved February 22, 1872 (Laws 1871-72, p. 348), the 65th section of which, being identical with the 66th section of the present Practice Act, provides that "any person, for a debt *bona fide* due, may confess judgment by himself, or attorney duly authorized, either in term time or vacation, without process. Judgments entered in vacation shall have like force and effect, and from the date thereof become liens, in like manner and extent as judgments entered in term." In *Middleton v. White*, 35 Ill. 114, it was said in reference to a similar local law passed in 1857, for the benefit of Kane and three other counties, "the counties of Kane, etc., are large commercial counties, and required greater facilities for the transaction of business than theretofore existed in them, and to meet this exigency the act of 1857 was passed."

There are law writers who give a broader definition of the term "vacation" than the one above quoted. Abbott says: "Any continuous authorized sitting of the courts is probably known in most of the States as a term." 2 Abb. Law Dict. 552. Bouvier defines "term" as "the space of time during which a court holds a session." Burrill says in defining the word vacation: "In practice; intermission of judicial proceedings; the recess of courts; the time during which courts are not held." He also gives as one of the definitions of the word, that quoted above from Jacobs. Wharton defines the word vacation: "Intermission of judicial proceedings, or any other stated employment; recess of courts or senates."

The statute in question is a remedial one, and a point to be considered in the construction of all remedial statutes is, the old law, the mischief and the remedy, and it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. 1 Bl. Com. 87. As was said in *Railroad Co. v. Dunn*, 52 Ill. 260: "The rule in construing a remedial statute, though it may be in derogation of the common law is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it."

In accordance with what was said in *Middleton v. White*, as before cited, greater facilities in the taking of judgments by confession were required than was afforded by the former law limiting the taking of such judgments to open court in term time, to meet which exigency the 18th section of the statute of February 22, 1872,

was enacted, authorizing judgments by confession in vacation, as well as in term time. That is, practically, to allow judgments to be confessed at any time, as according to the practice which had before prevailed, it would essentially always be either term time or vacation. We would not be understood as holding that under this act, vacation means all the time the court is not in actual session, or that it embraces the time of adjournment from day to day; but we are clearly of opinion that where there is the adjournment of court for any such period of time as is found in the present case, the true construction of this 66th section of the Practice Act requires that the broader definition which we find of the term "vacation" should be adopted, and that the time of recess should be considered as in vacation, for the purpose of admitting the taking of judgments by confession. This we regard as the practical and reasonable interpretation, and the one that should be given in furtherance of the intention of the act, and in advancement of the remedy which it seeks to give.

The propriety of the construction finds illustration in the condition, as counsel for defendants in error state, which existed in the circuit from which this cause comes, at the time of the preparation of their brief, April 16, 1884. It is said that on that day, in three of the six counties constituting the circuit, sessions of court were being held by judges present; that in the three other counties the courts stood adjourned, but not finally, under the judge's order. Under the construction contended for by counsel for plaintiff in error, judgments by confession could not at that time have been taken in the three latter counties in which the courts stood adjourned, because it was term time there, although the judges of the circuit were holding actual sessions of their courts in the other three counties. Manifestly, such was not the intention of the act. The term time of the courts in that circuit was in the counties where the courts were being actually held, and in the other counties it was in reality vacation, within the intendment of this 66th section of the Practice Act, so as to admit the taking of judgments by confession as in vacation. To hold otherwise would be to adopt a legal fiction, and give it effect over what was the real condition, to the denial of the enlarged remedy which was intended to be given by the statute.

A point is made that the clerk of the Circuit Court had no authority to enter a judgment by confession in vacation without an order

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of the judge directing it to be done. It has been repeatedly held that the entry of a judgment in vacation is not a judicial act. *Durham v. Brown*, 24 Ill. 93; *Ling v. King*, 91 Ill. 571. With us the judge has no power to make orders in vacation, unless it be conferred on him by statute. *Ling v. King, supra*. The statutes giving powers to the judges in vacation do not include the power to order the entry of judgments by confession. It is true, the statute does not in terms authorize the clerk to enter up the judgment; but as it provides that judgments may be confessed in vacation, it by necessary implication gives such authority.

Because in the several local laws authorizing judgments by confession, which had heretofore been passed for the benefit of particular named counties, there was the provision that such judgments might be entered "upon filing the proper papers with the clerk of the court," it is argued that the absence of such a provision in this general act denotes the purpose not to confer upon the clerk the power to enter such a judgment. This cannot truly be said, in view of the fact that the want of such power would render the act of no effect, and the omission of that provision signifies no more, we think, than that it was deemed superfluous to express that which was necessarily implied.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

CRAIG, J., dissenting.

BAY V. WILLIAMS.

(112 Ill. 91.)

Mortgage — assumption.

A purchaser of mortgaged lands from the mortgagor, by a deed reciting that he assumes the mortgage, becomes at once personally liable to the mortgagee, and cannot evade this liability by a release from the mortgagor.*

FORECLOSURE. The opinion states the case. The plaintiff had judgment below.

John Woodbridge, for appellant.

* See *Dean v. Walker* (107 Ill. 540), 47 Am. Rep. 467, and note, 478. A covenant to "assume" is a covenant to pay. *Schley v. Fryer*, 100 N. Y. 71.

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It appears from the record in this case, that Mrs. Camelia J. Williams, on the 11 day of March, 1873, sold to Newman & Sissons forty acres of land lying several miles south of the city of Chicago, for the sum of \$12,000, and after deducting the advanced payment, took their promissory notes, payable in installments. To secure the deferred payments they executed to Thomas Dent a trust deed on the property, containing the usual powers conferred by such instruments. Appellant, on the 8th day of September of the same year, purchased the land of Newman & Sissons for the consideration named in their warranty deed of \$24,000. Their deed contained an express promise on the part of appellant to pay and discharge the debt secured by the trust deed on the land in favor of Mrs. Williams. The provision is in this language: "Which said notes for principal and interest, said party (George P. Bay) expressly agrees to pay." Appellant afterward, on the 7th day of October, 1878, applied to Sissons and he, for the expressed consideration of one dollar and other sufficient considerations released appellant from this obligation. Appellant also applied to Newman, who had asked to be discharged from his debts in bankruptcy, for a similar release, but he declined to give it. Newman subsequently obtained his discharge in bankruptcy. Mrs. Williams, on the 5th day of November, 1879, filed this bill to foreclose mortgage, and on a hearing, on the 27th day of May, 1881, she recovered a decree of foreclosure. The master sold the land, and it was bid off by her at \$12,525, which left \$3,559.46 unpaid on the decree. Afterward, on the 12th of September, 1883, the court found that appellant had assumed to pay the debt secured by the trust deed, and thereby became personally liable for the deficiency, and decreed that an execution issue for the unpaid balance of the decree. He appealed to the Appellate Court for the first district, where, on a hearing, the decree of the lower court was affirmed, and the case comes to this court by another appeal.

The question presented for determination is, whether the court below erred in rendering this supplemental decree awarding execution against appellant.

It is first claimed that the evidence is not sufficient to establish the fact that appellant ever consented to or became bound by the clause the deed from Newman & Sissons to him, and in support of the proposition in the case of *Thompson v. Dearborn*, 107 Ill. 88, is invoked. In that case, which was a decree on an order *pro con-*

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fesso, the bill failed to allege that Thompson ever assented to or had any knowledge that Funk, the mortgagor, had made such a deed. In the absence of all proof showing that Thompson assented to the execution of the deed, or had ever ratified it in terms, or tacitly by receiving it, or in some other manner, it was held that the bill failed to show a liability, that to fix the liability of such a grantee it must appear that he participated in its execution, or had knowledge that it had been made and assented to, or in some manner approved or ratified it; otherwise it would be in the power of the mortgagor, of his own motion, without the knowledge and without the assent of the grantee, to render any one liable to pay the mortgage debt by simply executing to him a deed containing such a clause, and having it recorded in the proper office. No such question arises in this case, as appellant admits that he participated in the execution of the deed and received it from the grantors.

Appellant refers to decisions in other States to show that unless the mortgagee actually agrees to look to the grantee of the mortgagor as his debtor, he does not become liable. It appears that adjudged cases of the courts are not harmonious, not even the courts in the same States, and it may be added that the cases are not capable of being reconciled. There could therefore be no reason for the endeavor on our part to attempt to conform our decisions to those of other States, as there would still be a want of harmony, and when other decisions shall be made, would induce the effort for further change in our decisions. On the mere authority of adjudged cases in other tribunals, we would have to vacillate to keep in line. We can see no necessity or reason for overruling our previous decisions, which are harmonious, and date almost from the organization of the court. In the recent case of *Dean v. Walker*, 107 Ill. 540; s. c., 47 Am. Rep. 467, these questions were pressed upon our attention, and most of the authorities now referred to by appellant, with others, were carefully and deliberately considered, and we held adversely to the views of appellant now pressed on our attention, and the decision of that case must conclude their discussion in this case. The doctrines of that case are in accordance with the uniform decisions of this court, and we regard them as settled in this jurisdiction. We therefore decline to enter upon their further discussion in this case. The elaborate argument of appellant has failed to convince us that our former decisions are not sound. It therefore would answer no

beneficial purpose to review our decisions, and repeat arguments heretofore adduced in their support.

It is next urged, that admitting the doctrine to be correct, appellant was absolved from all liability by Sissons' release, and cases are cited to the effect that the mortgagor may release his grantee from his promise to pay the debt of the mortgagee at any time before such mortgagee brings suit to enforce the promise. The cases referred to proceed upon the grounds that the promise of the grantee is made to his grantor, and not to the mortgagee, and that the latter has no interest in the promise until he assents to and relies upon the promise, and such acceptance is manifested by bringing suit to enforce the promise; or they proceed in other cases upon the theory that by relying on or accepting the promise of the grantee to the mortgagor, the mortgagee releases the mortgagor and accepts his grantee as his debtor; and there is still another theory, and that is that the promise by the grantee is in the nature of an indemnity to the mortgagor, and under either of these theories the mortgagor may surrender or release the indemnity, or release the grantee from his promise before it is accepted, or before the mortgagor is released from the debt by the mortgagee. This court has never recognized either of these theories as the law. It has ever been held by this court that such a promise inures to the benefit of the person for whose benefit it is made, and the right to sue is vested in him by force of the agreement itself. It has never been held by this court that the express assent of the beneficiary is essential to his right to avail of its benefits; nor has it been held, to have force as an agreement to the person in whose favor it was made he must discharge his debtor and accept the maker of the new promise as his debtor. On the contrary, it was held in *Dean v. Walker, supra*, that the mortgagee might sue either the mortgagor or his grantee assuming to pay the debt. Nor has it been held that the promise of the grantee to the mortgagor is a mere indemnity of the latter against the payment of the mortgage. On the contrary, this court has uniformly held that the beneficiary may sue at law, which repudiates the doctrine of indemnity, as the person for whose benefit the promise is made can never reach an indemnity or security given to his debtor but in chancery, and then only when his debtor is insolvent, or on some other equitable grounds. The principle upon which this court has acted is that such a promise invests the person for whose use it is made

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with an immediate interest and right, as though the promise had been made to him. This being true, the person who procures the promise has no legal right to release or discharge the person who made the promise, from his liability to the beneficiary. Having the right, it is under the sole control of the person for whose benefit it is made, as much so as if made directly to him.

It is urged there was not a sufficient consideration to support the promise of appellant to pay the debt owing to Mrs. Williams. That is a misconception. He received the equity of redemption of the land, which he supposed was worth all that he promised to pay, and that was sufficient to support the promise. Nor does it matter whether it was received from his grantors or Mrs. Williams. Whether from the one or the other, it was equally binding. There is no force in this objection.

Perceiving no error in the record, the decree of the Appellate Court is affirmed.

Decree affirmed.

SCHOLFIELD, C. J., and DICKEY and SHELDON, JJ., dissenting.

MILLS V. NEWBERRY.

(113 Ill. 128.)

Will—trust for charity—certainty.

Devise was made by a daughter to her mother of all her estate, "upon the express condition however that she devise, by will to be executed before receiving this bequest, so much thereof as shall remain undisposed of or unspent at the time of her decease, to such charitable institution for women in the city of Chicago, as she may select." The mother declined to execute such will. *Held*, that the trust could not be executed until the mother's death. (*See note, p. 222.*)

CONSTRUCTION of a will. The head-note states the point.

Luther Laflin Mills and Rosenthal & Pence, for appellant.

Williams & Thompson, Edward S. Isham and Francis Kernan, for appellee.

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SHELDON, J. The contingency mentioned in the first clause of the will occurred, and there were none to take under the will other than Mrs. Newberry, the mother, and some charitable institution for women in Chicago. The condition of Mrs. Newberry taking under the will was, that she should, before receiving the bequest to her, execute a will devising, as mentioned, the undisposed or unspent part of the property. This condition we regard a condition precedent. Mrs. Newberry declined to execute the will and perform the condition. She could then take nothing under the will. Where then did the property bequeathed to her go? When a legacy is given upon a condition precedent not performed, the legacy falls into the residue, and where a legacy lapses, there being no residuary bequest, it will go to the next of kin as estate undisposed of under the will. 2 Redf. Wills, 175, 176; *Prescott v. Prescott*, 7 Metc. 141.

It is insisted that there was here a residuary clause; that the whole estate was given to two parties, the mother and charity; that the estate was to go, a certain portion to the mother, the remainder, "so much thereof as shall remain undisposed of and unspent," was to go to charity. That what shall remain means the *residuum*, and charity is to take the *residuum*. The remainder here spoken of is by no means tantamount to a residuary clause, which will embrace and carry all that is not disposed of to others by the will. It is a remainder which embraces but that which shall remain undisposed of or unspent at the time of the decease of Mrs. Newberry. It is something which may never be, and if it ever shall arise, it will only be upon such decease.

It is urged again, that by the doctrine of acceleration charity is immediately entitled to the whole of the estate, such doctrine being, that if there is a gift to one person for life, and after his death to another, if the first one is incapable of taking, or if he refuses to take, the remainder is accelerated. Although the ulterior devise, in terms, is not to take effect in possession until the decease of the prior devisee, if tenant for life, yet in point of fact, it is to be read as a limitation of the remainder, to take effect in every event which removes the prior estate out of the way. Theobald Const. Wills, 450; 1 Jarm. Wills (5th Am. ed.), 574; *Blatchford v. Newberry*, 99 Ill. 11.

It is said the whole estate here was given to two parties, the mother and charity, in succession; that it was not intended that any part

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of the estate should become intestate, or that the next of kin, as such, should receive any thing, and that the intention was, that when the estate of one party ceased, that of the other should commence in possession; that such is the result here under the rule of acceleration, and that the court should ascertain the special object of charity, and order the whole fund paid over at once by Mrs. Newberry to such object. What here stood in the way of any thing going over to charity, was the enjoyment of this property by Mrs. Newberry, with the right of expending and disposing of it until the time of her decease. This prior estate has not been removed out of the way, it has not gone or would not go over to any other person, but is in the rightful possession and use of Mrs. Newberry, with full capacity of spending and disposing of it. True, the enjoyment of the property by her is not under the will as devisee, but under the law as next of kin. But what difference should that make? The technicality of how the mother enjoyed, whether as devisee or next of kin, the testatrix could have cared nothing for. The thing substantial was the use and enjoyment of the property for life. As next of kin, Mrs. Newberry enjoys the use of the property, and the right of expending and disposing of it, just the same as she would have done had she executed the will as required by the first clause. All that has happened is that Mrs. Newberry has refused to perform the condition, to execute the will. But that in no way interrupts her use and enjoyment of the property. What was to go over to charity was not that which remained undisposed of or unspent at the time of refusing to perform the condition or to take under the will, but it was so much as should remain undisposed of or unspent at the time of Mrs. Newberry's decease. She was to have the use and enjoyment of the property, with the power of disposing of it, so long as she lived. The refusing to perform the condition cannot be taken as the equivalent of her death. Had any thing occurred to cause inability afterward to make any use of the property and to expend or dispose of it, that with some reason might be urged as such equivalent, and as accelerating the enjoyment by the ulterior object of bounty.

The rule of acceleration is applied in supposed fulfillment of the testator's intention. The paramount intention appearing in this will is, that the mother should have the possession, use, enjoyment and disposition of the whole of this property so long as she lived. The interest of charity was quite subordinate in the testatrix's

consideration, and it was but the undisposed of and unspent remnant remaining at the end of life. It would be doing the greatest violence to the intention disclosed in the will, to hand all the property over to charity upon the mother declining to execute the will mentioned in the condition, and in our opinion there is no legal principle which so requires. Their being no residuary clause in the will, upon non-performance of the condition precedent the property went over to the next of kin, and the executor rightly distributed the same to Mrs. Newberry, as such next of kin.

Taking this as being so, it is then contended for appellant, that it was but the legal title to the property which went to Mrs. Newberry, and that there was a trust in favor of charity attached to the property in her hands, created by the words of the condition in the first clause. We agree in the main with what is urged by appellant's counsel upon this branch of the cause, except in its application in this case. It has been established from a series of cases, that where a bequest accompanied by words expressing a command, recommendation, entreaty, wish or hope on the part of a testator, that the donee will dispose of the property in favor of another, a trust will be created, first, if the words on the whole are sufficiently imperative; second, if the subject be sufficiently certain; and third, if the object be also sufficiently certain. Hill Trustees, 110. Such a charity as here is favored in law, and will receive a more liberal construction than will be allowed in gifts to individuals. As is said by Story: "In the interpretation of the language of wills, courts of equity have gone great lengths, by creating implied or constructive trusts from mere recommendatory and precatory words of the testator." 2 Story Eq. Jur., § 1068. But as said further in section 1069: "In more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." There is in this case more than the expression of mere recommendation, confidence, hope, wish and desire that the remainder left of the property should go to charity. It is made an express condition that the devisee, before receiving the bequest to her, shall devise, by will to be executed by her, such remainder to charity. The language is of a peremptory and imperative nature, expressive of the testatrix's intention which she wills to be performed, answer-

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ing the description of a will, as legally defined: "The legal declaration of a man's intentions, which he wills to be performed after his death." 2 Bl. Com. 499.

We think the language of this condition fully sufficient to create a trust with respect to such property as may be the subject of a trust. And we do not feel any difficulty in respect to uncertainty of the object of the bounty to charity, or in respect to the necessity of a will from Mrs. Newberry in order to carry the subject of the bounty. Although the condition reads that Mrs. Newberry should devise by will the undisposed of or unspent part of the property to such charitable institution for women, in the city of Chicago, as she might select, we do not deem it of the essence that Mrs. Newberry should have made the will or the selection. There is here expressed a general intention in favor of charities for women in Chicago, and a power given to Mrs. Newberry to select the particular object of charity; but her failure to make the selection the court will not allow to disappoint the beneficiaries, but will carry into effect the general intention in favor of the class, and will itself execute the power to select the particular object of charity. As observed by Mr. Perry, in his work on Trusts (vol. 1, § 250), Lord COTTENHAM, in *Burroughs v. Philcox*, 5 M. & C. 72, stated the general rule deduced from the cases as follows: "When there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class. When such an intention appears, the case arises as stated by Lord ELDON in *Brown v. Higgs*, 8 Ves. 574, of the power being so given as to make it the duty of the donee to execute it; and in such case the court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit." It was said by this court in *Heuser v. Harris*, 42 Ill. 435: "The opinions in the cases of *Moggridge v. Thackwell*, 7 Ves. and *Mills v. Farmer*, 1 Merrivale, were by Lord ELDON, and resulted in this, that if a testator has manifested a general intention to give to charity, the failure of the particular mode by which the charity is to be effected will not destroy the charity, for the substantial intention being charity, equity will substitute another mode of devoting the property to charitable purposes, although the formal intention as

to the mode cannot be accomplished." And see 2 Story Eq. Jur., § 1167.

But an insuperable difficulty which we find to be in the way of the present proceeding is the uncertainty as to the subject-matter of the trust attempted to be asserted. The subject is, so much of the property as shall remain undisposed of or unspent at the time of the decease of Mrs. Newberry. The property having been previously given to her absolutely, we construe the above as giving her the full power of expenditure and disposition of the property during her life-time. What then, is there to which a trust can now attach — which a court of equity can now take hold of, and administer as trust estate? Evidently nothing. It is not the whole property, nor is it any particular part of it, for it all must remain with Mrs. Newberry so long as she lives, for her to spend and dispose of. There may, or there may not, be something remaining undisposed of or unspent by her, at the time of her decease. Whether any thing at all will be so left, is now entirely uncertain. The authorities fully establish that the subject-matter of the supposed trust must be certain. "To constitute a valid trust, undoubtedly three circumstances must concur: Sufficient words to raise it, a definite subject, and a certain or ascertained object." Sir WM. GRANT, in *Cruwys v. Colman*, 9 Ves. 323. "I do not lay it down that in a will a request may not amount to a legacy, but it should be limited to some certain thing or for some certain part of a thing, and not left absolutely to the pleasure of the person to whom the request is made." Lord HARDWICKE, in *Bland v. Bland*, 2 Cox, 355. In the language of Story: "Wherever therefore the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion or choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership; in all such cases courts of equity will not create a trust from words of this character." 2 Story Eq. Jur., § 1070. The rule, which we believe to be amply supported by the authorities, is thus laid down in *Hill Trustees*, 119: "But any words by which it is expressed, or from which it may be implied, that the first taker has the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, will prevent the subject of the gift from being considered certain." See also *Knight v. Knight*, 3 Beav. 173; *Howard*

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v. *Carusi*, 109 U. S. 725; 2 Pom. Eq. Jur., §§ 1014–1017; *Williams v. Worthington*, 49 Md. 572; s. c., 33 Am. Rep. 286.

We do not consider, as indicated in the earlier part of this opinion that the uncertainty in the subject has been removed by the refusal of Mrs. Newberry to perform the condition.

It is suggested that the true construction of the words, “remain undisposed of and unspent,” means that the whole estate of the testatrix, Julia Rosa Newberry — that which remained undisposed of and unspent by the testatrix, should go over to charity upon the death of Mrs. Newberry, who should be held simply a trustee of the fund. We cannot think this to be the correct construction, but that the clear meaning is, that it was the remnant of the property remaining “undisposed of and unspent” by Mrs. Newberry at the time of her decease, which was to go over to charity.

We find that the condition in question fails in the condition of certainty as to the subject, essential to the creation of a trust, by the words used, and we hold at least that the present proceeding is premature, in there being no subject now existing to which a trust can attach, and in respect whereof the interference of a Court of Chancery can be called for or exercised.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

MULKEY, J. I concur in the conclusion reached in this case, and in most that is said in the opinion of the majority of the court, but not in all. In so far as the opinion seems to hold the testatrix's intention in respect to the rights of the mother under the will is to be given effect just as though there had been no renouncement of it, and that for this purpose it is immaterial whether she takes under the will or by intestacy, I am unable to concur. This seems to me to be making the will speak and not speak, at the same time. The will may still be looked to for the purpose of determining whether, notwithstanding her renunciation, any thing is given to charity, and if so, what it is. The intentions of the testatrix in respect to the mother are based upon the hypothesis that she would accept the provision made for her, as made; but this intention she has defeated by her renunciation. As I view the matter, when Mrs. Newberry renounced the will all her rights under it at once ceased, and her relation to the property bequeathed to her became precisely the same as if no bequest had been made to her at all. Her renun-

ciation is just as fatal to and destructive of the testatrix's intention and purposes in her behalf, as it is to the bequest itself. As next of kin to her deceased daughter, she takes the property without regard to any condition or provision in the will relating to her, and as is conceded by all, with absolute power of sale and disposition for her own account. Such being the case, I see nothing to which a trust in favor of charity can now, or at any future time, attach. I cannot, therefore, concur in the view which the majority opinion seems to hold, that if upon Mrs. Newberry's death any of the property shall remain undisposed of, it will, under the will, belong to charity. All the authorities agree that a testamentary trust, to be valid, must be limited to some certain thing, and this certainty as to the subject of the trust must appear from the will itself when it first speaks, namely, at the death of the testator. As is well said by Sir WM. GRANT, in *Cruwys v. Colman*, 9 Ves. 323, it cannot be "left absolutely at the pleasure of the person to whom the bequest was made," the very thing which was attempted to be done here. What is the subject of the trust in this case? Is it the whole, half, tenth, hundredth or thousandth part of the property bequeathed to Mrs. Newberry, or is it any thing at all? It is conceded by the majority of the court that it may turn out to be nothing. Thus it is said: "It is something which may never be." A gift to charity may well be postponed to a future day, or it may be made to depend upon some contingency that may, or may not happen. But in all these cases the subject of the trust, whether it be land, money or chattels, must be so definitely pointed out and described by the instrument creating the trust, that a court of equity may protect it and preserve it intact for the use and benefit of the object of the gift.

In determining whether any thing is given to charity in this case, I think, with the majority of the court, the will must be construed in the same manner it would be if the devise had been made to Mrs. Newberry unconditionally, giving her, as it did, an absolute power of user and disposition on her own account, and had then contained a provision directing her, by her last will and testament, to devise whatever might remain of the bequest to her, if any thing, to charity, as indicated in the present will. Looking at the will in this light, it does seem to me there is no ground for controversy. The subject of the devise in this case is personal property, with the exception, perhaps, of one piece of land lying in a sister State. So

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far as the land is concerned, the rule applicable to such a devise is well stated in 2 Jarm. Wills (5th Am. ed.), 528. It is there said: "A power of alienation is necessarily and inseparably incidental to an estate in fee. If therefore lands be devised to A. and his heirs, upon condition that he shall not alien them, or charge them with any annuity, the condition is void." And on the next page the author adds: "So if lands be devised to A. and his heirs, with a gift over if he die intestate or *shall not part with the property in his life-time*, the gift over is repugnant and void." (See also vol. 1, page 653, where the same doctrine is laid down in strong and emphatic terms.) If such be the rule in respect to real property, no argument or authority is necessary to show that it applies with greater strictness to personal estate. While in equity, a life estate may be given in money or other chattels whose use does not consist solely in their consumption, yet no rule of law is regarded more elementary or better settled than that any limitation over or condition affecting the right of user or disposition after an absolute and unqualified gift of personal property, whether in a will or deed, is repugnant and inconsistent with the gift itself, and is therefore void. *Watkins v. Williams*, 3 Mac. & Gord. 628; *Ross v. Ross*, 1 J. & W. 154; *Cuthbert v. Poumer*, Jac. 415; 2 Redf. Wills, par. 19, § 24, chap. 3.

Without stopping to discuss what may be regarded as limitations or exceptions to the above general rule, as applicable to either real or personal property, I assert with the utmost confidence, that no respectable authority has been or can be produced that takes the present case out of the general rule as above stated. The present case is but another of the many instances with which the books abound, where one after having made an absolute gift of property, has attempted to control its future disposition or use, a thing which the law does not allow, as has been held perhaps a thousand times.

I am therefore of opinion the so-called bequest to charity is *ab initio* inoperative and void, on both the grounds stated.

DICKEY, J. I think the subject of the attempted gift to charity is so uncertain as to render that provision void. I am also inclined to think the object of the attempted gift is not sufficiently certain to render the same effective. I think the heir takes the property free from the alleged trust for charity.

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NOTE BY THE REPORTER.—The following bequests have been held void for indefiniteness: What shall remain or be left at the decease of a prior legatee. *Bland v. Bland*, 2 Cox, 349; *Pushman v. Filliter*, 3 Ves. 7; *Perry v. Merritt*, L. R., 18 Eq. 152. What the legatee is possessed of at the time of his death, *Atty-Gen. v. Hall*, 1 J. & W. 158; *Pope v. Pope*, 10 Sim. 1. What he does not want, *Sprague v. Barnard*, 2 B. C. C. 585. What he does not spend, *Henderson v. Cross*, 29 Beav. 216. What he can transfer, *Flint v. Hughes*, 6 Beav. 342. What he can save out of his yearly income, *Cowan v. Harrison*, 17 Jur. 818. What remains undisposed of or is not disposed of by deed or will, *Bourn v. Gibbs*, 1 R. & My. 614; *Phillips v. Eastwood*, 1 L. & G. 270. The bulk of certain property, *Palmer v. Simonds*, 2 Drew, 221. A gift over of the whole legacy in case of the death of the prior legatee intestate, *Green v. Harvey*, 1 Hare, 428.

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(112 Ill. 154.)

Partition — right to.

A lessee of lands, the reversion in fee of which is in tenants in common, may upon purchasing a part of the reversion demand a partition even though it will necessarily result in a sale of the premises.

PARTITION. The opinion states the case. The defendant had judgment below.

Campbell & Custer, for appellant.

Waite & Clarke and *J. B. Skinner*, for appellee.

MULKEY, J. This is an appeal from a decree of the Superior Court of Cook county, dismissing on the hearing a bill brought by William Hill, the appellant, against Sarah A. Reno, Eugenia M. Little, Charles A. Reno and Jacob H. Little, the appellees, for the partition of certain real estate in the city of Chicago.

No controverted questions of fact arise upon this record. The undisputed facts of the case are, that Abner R. Reeves, being the owner in fee of the land in controversy, on the 28th of January, 1872, leased the same to William Parmelee for a term of twenty years, from the first day of April then next following, at an annual rent of \$2,400 for the first five years, to be paid quarterly. At the expiration of the first five years, and at the end of each successive

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five years a new valuation or rental of the premises, equal to six per cent of their entire value, was to be fixed by arbitrators, to be chosen as in the lease provided. The lessee was to pay all taxes and assessments, including water rates, and in case of failure to do so, they were made a lien upon the improvements to be erected on the premises by the lessee. The latter covenanted and agreed to erect on the demised premises a building to be worth at least \$10,000, which the lessor agreed to purchase at the end of the term, at a price to be fixed by arbitration. The lessee was authorized to sell or assign his interest in the term, but the assignee was to be bound by all the covenants in the lease. While this lease was in full force, to-wit, on the 31st of October, 1875, the said Abner Reeves died intestate, seised in fee of the reversion in said premises, leaving certain collateral relations as his heirs at law, among whom were his sisters, Sarah A. Reno and Eugenia M. Little, the other appellees being their respective husbands. Having acquired by purchase the interests of some of the other heirs in addition to what they had inherited themselves, Mrs. Reno and Mrs. Little, at the time of filing the present bill, respectively owned about one-third of the premises in question, and the residue belonged to the appellant; as hereinafter shown. Parmelee erected the house on the premises, as provided for in the lease, and subsequently sold and transferred the same together with said lease to others. In 1880, appellant purchased the leasehold estate, together with the building thereon, and took an assignment of the lease. In the following year he purchased and became assignee of so much of the reversion in said premises as was not owned by appellees, being a fraction over a third interest. After the commencement of the present suit, to-wit, on the 23d of May, 1882, appellant and appellees selected arbitrators in pursuance of the provisions of the lease, who appraised the rent for five years, from April 1, 1882, to the satisfaction of the parties respectively, since which time appellant has regularly paid appellees their respective shares of the rent under such appraisement. It was also stipulated between the parties for the purpose of the hearing, that the premises in question were not susceptible of division, except by means of a sale thereof.

Under the facts stated the simple question presented for determination is whether the lessee of real estate, the reversion in fee of which is in several tenants in common, can, by purchasing a part of the reversion, and taking an assignment thereof to himself,

demand as a matter of right, a partition in chancery, when such partition will necessarily result in a sale of the premises.

Before giving a direct answer to this question it is proper to determine the exact legal relations of these parties with respect to the property in controversy. Upon the death of Reeves, the lessor, there was by operation of law a severance of the estate into as many distinct freeholds as he left heirs succeeding to the property, the share of each depending upon the nearness of the relation he bore to the deceased; but the law did not, and of necessity could not ascertain or define the boundaries of their respective estates, hence it left them to possess and occupy the premises as a whole, according to their respective interests, until a partition could be effected in some mode authorized by law, in other words, upon the death of Reeves his heirs at law succeeded to the property in question as tenants in common. The same law, therefore, which clothed them with the title to the property imposed upon them and their assigns all the inconveniences and hardships incident to the ownership of real estate thus held. Sec. 1, chap. 39, Rev. Stat.; 1 Wash. Real Prop. (4th ed.) 653. Perhaps the most important right which the law has annexed to this kind of tenancy is that of partition. In very ancient times this right, at least at law, was confined exclusively to lands held in parcenary, and as parceners always acquired title by inheritance, it followed the right extended only to estates in fee. But the law in this respect was changed by an act of the British Parliament, as early as 31 Henry VIII, extending the right of partition to estates of inheritance, in joint tenancy, and in common.

But it is not necessary to go back to the common law, and ancient British statutes made in aid thereof, in support of the right in question in this State, for it is expressly conferred by our own legislature. Section 1, chapter 106, of the Revised Statutes, provides, "that when lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or co-parcenary, whether such right or title is derived by purchase, devise or descent, or whether any or all of the claimants are minors or of full age, any one or more of the persons interested therein may compel a partition thereof, by bill in chancery, as heretofore by petition in the Circuit Court of the proper county," etc. Since the statute gives to every tenant in common of a freehold estate the right to coercive partition by bill in chancery, as the right had existed and been

enforced by courts of equity before the passage of the act, it is important to determine with some particularity, the true limits of chancery jurisdiction over the subject as it exists, independently statutory provisions. While there is considerable controversy among authors as to when courts of equity first assumed jurisdiction in partition cases, and also as to the true grounds of the jurisdiction, yet all concede that it is of very ancient origin, extending back to the time of Elizabeth, and that no branch of equity jurisdiction is more universally recognized or firmly established than it is.

But the material question, so far as the case in hand is concerned, is, is this right to partition imperative and absolutely binding upon courts of equity where a case is fairly brought within the law authorizing a partition, or are courts of equity clothed with such discretion that under a given state of facts, they may grant the relief, or refuse it, and yet commit no error — or differently put, when they may grant the relief without committing an error, are they bound to do it? That they are so bound we think is fully shown by the general correct authorities. Freeman, in his work on Co-tenancy and Partition, § 424, in discussing this question says: “It is now certain that unless, when the titles of the respective parties are spread before a court of equity, it can see that there are legal objections to the complainant’s title, he can demand, as a matter of right, that it proceed with the partition.” No question is made as to the sufficiency of appellant’s title in this case. In *Smith v. Smith*, 10 Paige, 470, it is declared that partition is as much a matter of right in equity as it is at common law. In 5 Wait’s Actions and Defenses, the author lays down the rule in these words: “Tenants in common have an absolute right to a division of the land held in common, notwithstanding inconveniences may thereby result to the other tenants, or if partition cannot be made, to a sale and division of the proceeds,” citing many authorities in support of it. Bispham, one of the most polished and accurate of modern law writers, in discussing the subject in his work on Equity (2d ed.), 532, holds this language: “This jurisdiction was assumed some time about the reign of Elizabeth, and became so well established, both in England and the United States, that to invoke this equitable remedy has become a matter of right, and not of mere grace.” In support of the text numerous authorities are cited which fully sustain it. See also to the same effect, 2 Lead. Cases in Equity, pt. 1, p. 906 *et seq.*

In *Howey v. Goings*, 13 Ill. 95, this court cite with approval the following language held by the court in *Parker v. Gerard*, Amb. 236, namely: "That such a bill" (being a bill in equity for partition) "is a matter of right, and there is no instance of not succeeding in it but where there is not proof of title in plaintiff." It will be thus seen that this court at an early day placed itself in line with the general current of authority on this question, in strong and emphatic terms.

Notwithstanding the rule as stated is almost universally conceded, nevertheless there are certain well recognized modifications of it. For instance, if an estate should be devised or otherwise conveyed to two or more, upon the express condition that it should not be subject to partition, or if several tenants in common, or joint tenants, should covenant between themselves that the estate should be held and enjoyed in common only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties, against the objections of the others; and where the title of the complainant is doubtful, or in other words where he does not show a clear right to partition, it will not be awarded. So where several persons had purchased land, with a view of selling it out into lots for building ground, according to a certain plan, and it was agreed among them that neither of them should dispose of his share except in a certain manner, it was held, in a suit by the representatives of one of the parties against the survivors, that the agreement barred the right to partition. *Peck v. Cardwell*, 2 Beav. 137. See also in this connection *Cabbage v. Franklin*, 62 Mo. 364; *Selden v. Vermilya*, 2 Sandf. 568.

The principle which seems to underlie all these cases is, that equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel. It is supposed by counsel for appellees that some such defense arises out of the relations of the parties to this record, which renders it inequitable to grant the relief; but just what he or those under whom he claims have done to deprive him or the right of partition, the most valuable of all rights incident to such an estate, counsel have not satisfactorily shown.

Laying aside any vague or general notions we may have with respect to the merits of this case, let us look at the evidence itself

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to see if any such estoppel exists, and if so, the precise grounds upon which it rests. In the first place, it is to be observed that Parmelee, the original lessee, entered into no covenant or agreement, for himself or his assigns, that he or they would not purchase the reversion, or any part of it, after the execution of the lease, and no one pretends that under the general law there was any thing illegal or inequitable in doing so. It follows therefore that appellant, as assignee of the lessee, had a clear legal and equitable right to acquire his interest in the reversion as he did. By his purchase he became tenant in common of the freehold and inheritance with appellees, and so far as the right to partition is concerned, he unquestionably acquired the same right which the heirs had from what he purchased. Now it is manifest that either of the heirs, upon the death of Reeves, could, notwithstanding the lease made by him, have compelled a partition, by bill in equity, against the objections of all the other heirs and the owner of the term combined, although the partition would have resulted in a sale of the premises, and consequently, if not purchased by appellees, in depriving them of their shares of the rent and of all interest in or power to enforce the covenants in the lease, a matter to which great importance seems to be attached by appellees' counsel. If either of the heirs might, through the instrumentality of a court of equity, have accomplished this without any violation of appellee's rights, and this is not at all questioned, upon what principle can it be contended that appellant, the assignee of such heir, may not do the same thing, for at the very furthest he asks to do nothing more than what is conceded the heir might have done? The ordering of a sale of the premises will not necessarily deprive appellees of their rights under the lease. They have the same right to purchase them that any one else has, and if they are struck off to another for more than they are worth, or for more than appellees are willing to give, appellees will get the benefit of the enhanced price. As these matters are always taken into account by purchasers seeking investment for capital, viewed as a business transaction, it is to be presumed that the interest on the purchase money during the term would be about an equivalent for the rent, in which event appellees would lose nothing.

We agree with counsel for appellees on the question of *merger*. We think it clear, from the authorities, that upon appellant's purchase of his interest in the reversion there was a merger, *pro tanto*,

of the term, and consequently the covenants to pay rent, taxes, assessments, etc., were thereby extinguished as to the part purchased by him. *Taylor Land. and Ten.*, § 502; *Carroll v. Ballance*, 26 Ill. 19. But we do not agree with counsel for appellees as to all the consequences which they assume will flow from such merger. As we understand it, the merger of the term and extinguishment of the covenants as to appellant's interest did not, and does not, at all affect the respective rights of appellees under the lease. As to them, and their several shares in the property, the lease and all its provisions are in force and effect just as though no merger or extinguishment had taken place, and will so remain as long as they continue to be owners of the reversion. But as we have just seen, like all tenants in common of real estate not susceptible of partition except through the instrumentality of a sale, they are liable to lose all interest in the estate unless they will pay as much or more for it at the sale than any one else. As already seen, by the death of Reeves there was a severance of the freehold and inheritance into as many distinct estates as there were heirs, and an apportionment of the rent between them according to their respective interests. After such apportionment of the rent neither of the heirs had any interest in or concern with the rent belonging to the others, and upon appellant's purchase of the shares of some of these heirs, it relieved him from the payment of so much of the rent as would have been due them but for his purchase; but his liability as to the other heirs and their assigns remained precisely as it did before. *Taylor Land. and Ten.* (7th ed.), § 385; *Crosby v. Loop*, 13 Ill. 625.

Counsel for appellees say in their brief: "By the merger of the leasehold into the fee as to part of the premises, the covenants to pay rent and all taxes and assessments on that portion so merged have been forever extinguished, so that whoever should buy the premises as an entirety would take them in a very unsatisfactory condition. The sale would be made subject to the lease, and as appellant has a lease on two-thirds of the premises until April 1, 1892, and as from the nature of the premises it would be impossible to lease an undivided third to any other tenant, that portion would be not only entirely non-productive during the next nine years, but at the same time require the purchaser to pay out large sums for taxes and assessments." This is a misapprehension. The purchaser, in the case supposed, would have the same right to occupy and enjoy the premises, in proportion to his interest in the

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present estate, as the lessee himself; and if the lessee assumed the exclusive possession, he would be bound to account to the purchaser for something over one-third of their rental value, or the purchaser might rent, as is often done, his third interest, either to the lessee or a third party. A tenant in common has the same right to sell or lease his estate as an owner in severalty having exclusive possession. Freeman, in his work on Co-tenancy, section 220, says: "Co-tenants may lease either to one another or to strangers. They may all concur in the lease, or each may lease his moiety separately. If however the lessors be co-parceners, or tenants in common, the lease operates as the separate demise of each, and must be so treated," and this is the well-recognized doctrine on the subject.

The further statement of counsel, that appellant "being in possession of an undivided two-thirds by virtue of his lease, must of course get the benefits of the whole of the premises, as in that way alone could he secure his rights to an undivided two-thirds," is therefore wholly unwarranted. It may be conceded that inconveniences, and even losses, might occur by reason of the state of things suggested, but they would not necessarily happen, and they are only such inconveniences and possible losses as are incident to such ownership of property, and all property is liable to become subject to this species of ownership. Whoever therefore succeeds to an estate thus circumstanced, whether by descent or purchase, while accepting the benefits which it confers, must submit to all such inconveniences and losses as are incident to property thus held.

So far all the questions we have discussed are clearly settled by the authorities in the way we have stated, leaving no real ground for controversy. There is a single point however to notice, which presents the only difficulty or matter of doubt in the case. It is conceded if partition is awarded the premises are to be sold, and if so, of course must be sold as an entirety, subject to the lease, for we are satisfied the statute does not contemplate any other kind of sale. This being so, if the value of the shares of appellees, which are alone subject to the lease, are thereby enhanced, it is clear that a division of the proceeds of the sale in proportion to their shares in the fee would not be equitable to them, and if the converse of this hypothesis is true, that is, if their shares are worth less, by reason of being subject to the lease, they would receive more than they are entitled to if the proceeds were divided in that ratio. What is here said of the shares of appellees subject to the lease, with a slight

modification of the language, of course, is equally applicable to appellant's share, without the lease. It may well be that the shares in the fee now held by appellant, if bought by a stranger, being divested by the merger of all right to demand rent under the lease from the lessee, and of all right to demand of the lessee payment of taxes or assessments, are less valuable than had no merger occurred. It may be that the mere right to occupy and use the premises in common with the lessee of the shares held by appellees is not so valuable as would have been the rights under the lease had no merger occurred. These are questions which pertain to the distribution of the proceeds, and not to the right to have partition made. If it be true that by the merger of the lease *pro tanto*, mentioned above, the value of the shares in the fee held by appellant has been impaired, and the value of his leasehold estate has been thereby enhanced, the relative value of the shares in the fee held by appellant (as they actually now exist), and of the shares held by appellees, with the benefits of the lease, if any, can readily be ascertained by the master, and the partition of the proceeds of the sale should be made upon this basis.

But does this difficulty, if it may be so regarded, in the absence of any other valid objection, warrant a denial of the right of partition altogether? Appellees maintain that it does, and cite two cases that seem to favor that view of the subject, namely, *Lansing v. Pine*, 4 Paige, 639, and *Shillito v. Pullan*, 2 Disney (Ohio), 588. But it does not appear the statutes of the States in which these cases arose, regulating partitions, are the same as our own, and even if they were, we would not feel ourselves absolutely bound by them in giving effect or a construction to our own statute.

But waiving this consideration, to which we attach but little importance, and viewing the question in the light of the acknowledged general principles which govern Courts of Chancery in administering this branch of their jurisdiction, we are unable to perceive how the possible difference in the value of the shares of the parties, growing out of the fact that some of them are subject to an unexpired lease and others are not, presents an insuperable obstacle to a partition of the premises. It has always been understood, and it is so stated in all the text-books we have examined on the subject, that one of the peculiar and main advantages of a partition in equity over one at law is, that in the former all inequalities of this character may be fairly and equitably adjusted. Where an

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actual partition is made, and there is any inequality in the value of the shares not justified by the interests of the parties in the estate, the court will decree pecuniary compensation, called owelty. But where from any cause, one's share is worth more than another's, and a sale is ordered, the parties' rights are easily adjusted by a proper division of the proceeds. Bisham Eq., §§ 491, 492; Freeman Co-tenancy and Partition, § 425.

Applying these principles to the case in hand, if appellees' shares of this property are worth more by reason of being leased, as is contended by their counsel, is not that fact susceptible of proof, and cannot the difference be fixed by the evidence as definitely as any other fact which depends upon the opinions of witnesses? We are unable to perceive any serious difficulty in determining this difference, if any such exists, and when once ascertained there would certainly be no trouble in making distribution of the proceeds of the property accordingly. This course would be in strict conformity with the practice of courts of equity in exercising this jurisdiction, from the earliest times. Moreover after a most careful examination of the standard text-books on the subject, we find no such qualification or limitation in them as that contended for, and this we regard as a very significant fact.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with the views here expressed.

Decree reversed.

PECK V. COOPER.

(113 Ill. 122.)

Officer — of corporation — personal liability for tort.

The president of an incorporated omnibus company issued an order to the drivers to exclude all colored persons. *Held*, that he was individually liable for the ejection and personal injury of a colored person by a driver. (See note, p. 233.)

ACTION for wrongful ejection from an omnibus. The opinion states the point. The plaintiff had judgment below.

Wm. W. Gurley, for appellant.

E. B. McClanahan, for appellee.

WALKER, J. This action was brought to recover for damages claimed to have been sustained by plaintiff by being forcibly ejected from an omnibus controlled and operated by defendant in Chicago. There had been several trials in the Superior and Appellate Courts. On the last trial the jury found, and the court rendered a judgment against defendant for \$2,600, and the case comes to this court by appeal from the Appellate Court for the first district.

The "People's Omnibus and Baggage Line" was organized and became a corporation in 1871, and before the injury of which complaint is made. The horses and omnibus belonged to, and the driver was employed by the company. Appellant was the president of the company, and was sued individually in this action, and was held liable for the injury.

The law conferred on appellee the right to travel in the omnibus, and if he in the exercise of that right was injured by the order of appellant, the latter is liable to respond for the injury in damages. The fact that appellant was the president of the corporation is no protection to him in the commission of an illegal act, and where an officer of an incorporation performs an illegal act resulting in an injury to another, he is liable. Nor does it exonerate him from such liability because the corporation may also be liable. The only question therefore is, did appellant give the order to the drivers of omnibuses of the company to exclude colored persons from traveling therein? That is a question of fact that was submitted to a jury, and they found appellant gave the general order under which appellee was expelled and injured by the driver. The Appellate Court have by affirming the judgment approved of the finding, and we are precluded from reviewing the evidence on that question. There being no semblance of authority to justify the promulgation of such an order, appellant was properly held liable on proof of the fact, unless the trial court has committed some error as to the law in trying the case. We will proceed to determine whether any such error was committed.

It is urged that the court erred in permitting evidence to be introduced that appellant was a stockholder in the corporation, that he and his brother held a majority of the stock, and to inquire as to their disposition of the stock. This was clearly irrelevant to the issue, as whether they were stockholders or not, was wholly immaterial. Appellant was the president of the company, and if

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he had control of its management and the direction of its affairs, it was wholly immaterial whether he owned its stock, or what amount, or what he did with it. But notwithstanding the evidence in question was irrelevant, we are unable to perceive how it could have prejudiced appellant before the jury. If we were to reverse in every case where immaterial evidence is admitted, but few judgments would ever be sustained. It is only when we can see that the admission of such evidence worked, or probably did work, an injury to the party complaining, that we reverse.

There is an objection that the court erred in admitting the evidence of Young and Collins, who were drivers for the company at the time, that they had received from the assistant superintendent orders not to permit colored persons to ride in their omnibuses. If they received such orders, it was from a superior officer in the management of the affairs of the corporation. It may be it was inadmissible under the strict rules of evidence, but it was under the circumstances of this case, irrelevant, and could have done no harm.

It is also urged that the court erred in admitting evidence that the driver was retained in the employment of the company after appellee was injured. Such evidence has been held admissible, when the fact was known to the officer or agent of the company having power to discharge the negligent servant, as characterizing the animus of those controlling the company, and as an ingredient in the measure of the damages.

Inasmuch as we are precluded from considering the evidence, we must hold there is no error for which the judgment of the Appellate Court should be disturbed, and it is affirmed

Judgment affirmed.

SCHOLFIELD, C. J., dissented.

NOTE BY THE REPORTER. — In *Harriman v. Stowe*, 57 Mo. 93, it was held, that in a case of positive misfeasance, and not mere omission of duty, on the part of an agent or employee, he will be directly liable to a third party for injuries resulting therefrom. Thus where an agent undertook to build a trap-door, but did the work so negligently as to cause the injury complained of, action would lie by the injured party not only against the principal but the agent also. The court said :

“The agent is personally liable to third persons for his own misfeasances and positive wrongs, but he is not in general liable to third persons for his own non-feasances or omissions of duty, in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity,

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between him and such third persons ; and the privity exists only between him and his principal. Therefore, the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *respondeat superior*. Story Agency, § 308, and such is the general doctrine. 2 Kent Com. (10th ed.) 878, note ; Para. Cont. (5th ed.) 66 ; *Calvin v. Holbrook*, 2 N. Y. 126 ; *Denny v. Manhattan Co.*, 2 Denio, 118 ; 1 Bl. Com. 418.

“ The true distinction, as stated by Story, is between acts of misfeasance, or positive wrongs, and non-feasance, or mere omissions of duty. In the latter case, the master or principal is alone liable to third persons ; whilst in the former, the responsibility rests upon both the principal and agent. Thus, in *Wright v. Wilcox*, 19 Wend. 848, COWEN, J., speaking for the court, says : ‘ In a case of strict negligence by a servant, while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time and under the same circumstances ; the servant in fact, and the master constructively by the servant, his agent.’ Lord HOLT, in his celebrated judgment in *Lane v. Colton*, 12 Mod. 486 ; s. c., Ld. Raym. 646, 655, says that for the neglect of the servant, third persons can have no remedy against him, but that the master is alone chargeable ; but for a misfeasance, or actual tort, an action will lie against the servant, because he is a wrong-doer. The same views are confirmed in numerous adjudged cases. *Cary v. Webster*, 1 Str. 480 ; *Montfort v. Hughes*, 3 E. D. Smith, 591 ; *Suydam v. Moore*, 8 Barb. 358 ; *Phelps v. Wait*, 80 N. Y. 78.”

In *Wright v. Compton*, 57 Ind. 837, an action for injury by blasting, the court said “ that the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled.”

In *Phelps v. Wait*, 80 N. Y. 78, it was held that a joint action will lie against principal and agent for a personal injury caused by the negligence of the latter (in the absence of the former) in the course of his employment. Citing *Wright v. Wilcox*, *Suydam v. Moore*, *Hewitt v. Swift*.

The same was held in *Montfort v. Hughes*, 3 E. D. Smith, 591.

In *Bachelor v. Pinkham*, 68 Me. 253, it was held that a selectman of a town would not be liable for the trespass of a servant unless he directed or authorized it.

In *Stone v. Cartwright*, 6 T. R. 411, it was held that no action lies against a steward, manager or agent, appointed by chancery, for damage done by the negligence of those employed by him in the service of his principal, but only the principal or those actually employed are liable. Lord KENYON said “ the action must be brought either against the hand committing the injury, or against the owner for whom the act was done, but it never was heard of that a servant who hires laborers for his master was answerable for all their acts.”

In *Suydam v. Moore*, 8 Barb. 358, the engineer and fireman of a railway engine were held for running over cattle. The court says : “ When the act is a tort, arising from the negligence of the servant, while in the service and legitimate business of the master, the master and servant are both liable.”

In *Wright v. Wilcox*, 19 Wend. 848, it was held that an action lies against master and servant jointly.

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In *Hewett v. Swift*, 8 Allen, 420, it was held that the president of a corporation is not liable to an action for a personal injury merely by transmitting an order of the corporation to a servant, who, in executing it, uses illegal force; but if the order is issued by him on his own responsibility, he is liable.

In *Bath v. Caton*, 37 Mich. 199, the court said: "The judge laid down three propositions for the guidance of the jury, and in view of the state of facts exhibited, the effect of the two first of these propositions was to allow the jury to find Bath guilty of the trespass if satisfied that the surface captain and his workmen committed it, and that Bath, in his character of managing agent of the company, was director and controller of the business in which it was committed. This was error. *Brown v. Lent*, 20 Vt. 529; *Stone v. Cartwright*, 6 T. R. 411; *Milligan v. Wedge*, 12 Ad. & El. 787; Broom Com. on C. L. 690 to 698, top; Wood Mast. and Serv., §§ 281, 304; Story Agency, §§ 814, 815, 818, etc. His being managing agent of the company, and the trespass on Caton's land being in a course of business under his authority as agent, could not of themselves make the trespass so committed his trespass. It could not be regarded as done for him or in his interest. Neither could the surface captain and the workmen in committing the trespass be considered as standing in his shoes and representing him. It is not enough in such a case that there exists the relation of superior and subordinate. There must be something more. The relation must be such that the subordinate is the servant or agent of the superior in the particular course of business or sphere of action in which the wrong is done. Such was not the case here. In short the requisite conditions to authorize the application of the doctrine of *respondet superior* against Bath were not present. To apply it against him would imply that the company could not be held liable, a position which cannot be admitted. An acquiescence in the principle of the charge would introduce a new and dangerous element into the law of master and servant and principal and agent, and impose risks on intermediate agencies both inappropriate and embarrassing. There are cases which rest on peculiar grounds and are exceptional. The most important are maritime. There are none, however, which can influence the present case."

KELLEY V. VIGAS.

(123 Ill. 212.)

Will—per stirpes or per capita.

A testator directed that the remainder of his estate should be divided equally among his heirs. *Held*, that they took *per stirpes*.

PARTITION. The opinion states the case.

Morrison, Whitlock & Lippincott, for appellant.

James R. Ward, for appellees.

SCOTT, J. The bill in this case was brought by a part of the heirs at law of Titus W. Vigas, deceased, against his other heirs, for a partition of the real estate of which the testator died seised. Surviving the death of the testator, were his widow, (since deceased), his daughter Jane (intermarried with Milton F. Kelley), and his grandchildren, William Vigas, Titus Vigas, Hattie Vigas, and Josephine Vigas (intermarried with Christopher Doyle), children of his son, James Vigas, who departed this life before the death of the testator. Since the death of the testator, his grandson William Vigas has died without issue, leaving as his only heirs at law, his mother, Sarah F. Vigas, and his brothers and sisters, as above stated. It is alleged in the bill, that by the terms of the testator's will Jane Kelley, his only surviving child, would take but one-fifth of the "remainder" of the estate, and that the heirs at law of his deceased son would take the other four-fifths, and the Circuit Court so decreed. Jane Kelley, her husband joining with her, brings the case to this court, and assigns for error that decision of the Circuit Court.

The second clause of the will of Titus W. Vigas, deceased, which was duly admitted to probate in that county where he had resided, is as follows :

"*Second* — I give, devise and bequeath unto my beloved wife, Margaret T. Vigas, all my estate, both real and personal property, of whatsoever kind, during her natural life, and at her death, all the property aforesaid to her bequeathed, to my daughter Jane Kelley, the sum of \$1,000, and to my daughter-in-law Sarah L. Vigas, wife of James Vigas, deceased, lot No. 258, in Carlin's addition to the town of Carrollton, in the county and State aforesaid — the remainder of my estate to be divided equal among my heirs at law."

The widow, to whom a life estate was given by this provision of the will, has since died, and the question is, how shall the "remainder" of his estate be divided among the "heirs at law" of the testator. After making special devises and bequests, it will be observed the testator then provides, "the remainder of my estate to be divided equal among my heirs at law." The proof is, the testator left one daughter and four grandchildren his only "heirs at

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law," and the question is, how do they take the "remainder" of his estate, whether *per stirpes* or *per capita*. Although the will, in this respect, is by no means free from ambiguity, the court is of opinion the heirs take the "remainder" of the testator's estate *per stirpes*. That would give one-half of the "remainder" of the estate to his daughter, Jane and to the heirs at law of James Vigas, deceased, the other half. It will be observed the devise of the remainder of the estate, after the determination of the life estate first created, is to a class of persons, that is, to the "heirs at law" of the testator. To ascertain who are included in the class designated as "heirs at law," reference must be had to the statute of this State regulating descents and distribution of estates. The rule established by the decision of this court in *Richards v. Miller*, 62 Ill. 417, is when the statute is invoked to ascertain the persons who take a devise or bequest by a general description, its provisions as to the quantity each shall take must also be observed. The same doctrine had previously been declared in *Daggett v. Slack*, 8 Metc. 450, and in *Tillingast v. Cook*, 9 Metc. 143. It will be seen the testator, by his will disposed of the remainder of his estate to his "heirs at law," but made no devise of it to any one by name, other than designating them as a class. The word "heir," it is said when uncontrolled by the context, designates the person appointed by law to succeed to the estate in question, as in case of intestacy, and so the authorities seem to hold. Who are heirs of a deceased person is determined and declared by statute, and the quantity each shall take as heir is also fixed. Observing these rules of construction, it would seem the residue of the estate of the testator should be divided in accordance with the provisions of the statute, as in cases of intestacy. That being so, the heirs at law in this case, under the statute, would take the remainder of the testator's property *per stirpes*, and not *per capita*. This construction accords with what seems to have been the plain intention of the testator. The only doubt as to its correctness arises out of the use of the words, "equal among," in the will. It is understood the words, "equal among," or "equally," or "share and share alike," when used in a will, mean a division of the estate *per capita*; but this meaning of these words may be controlled by the context, and is often so done. That is the case here. The testator by making a bequest of money to his own daughter and a devise of land to his daughter-in-law, evidently

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intended to make an equal division of his estate between his daughter and the family of his deceased son, and it is not unreasonable to believe that was all he meant by the use of the words, "equal among." This most just intention ought not to be defeated by giving to the words employed in the will an arbitrary and technical meaning never understood or perhaps thought of, by the testator when he used them. This construction of the will not only conforms to what is believed to have been the evident intention of the testator, as manifested by the context, but it finds strong support in the previous decisions of this and other courts. *Richards v. Miller*, 62 Ill. 417; *Basset v. Granger*, 100 Mass. 348; *Boskin's Appeal*, 3 Penn. St. 304.

This case may be readily distinguished from *Pitney v. Brown*, 44 Ill. 363. In that case the devise of the residue of the estate was to devisees by name. Here the devise is to a class of persons designated as "heirs at law." In the former case, the persons to take the estate were specifically named, as well as the quantity each should take. But in the case being considered, reference must be had to the statute to ascertain who are the "heirs at law" of the testator, and when that is done, the rule seems to be that the statute also determines the quantity each heir shall take, as for instance, in *Richards v. Miller*, *supra*, the devise was to the "heirs at law" of the testatrix, and by the statute it was ascertained her husband was one of her heirs at law, and by the same statute he took one-half of the estate, to the exclusion of the collateral heirs, as in case of intestacy, and it was so decreed.

The decree of the Circuit Court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

PENNSYLVANIA RAILROAD COMPANY V. CONNELL.

(113 Ill. 205.)

Damages — carrier — wrongful expulsion.

Where a conductor of a railway company, acting under his instructions, refuses to accept a ticket issued by another company as agent of the former, and demands full fare, the passenger, if he refuses to leave, cannot recover for the necessary force used by the conductor in putting him off. (*See note*, p. 243.)

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ACTION for wrongful expulsion from a railway train. The head-note states the point. The plaintiff had judgment below.

Willard & Driggs, for appellant.

W. J. Hynes and *John I. Redick*, for appellant.

CRAIG, J. This was an action brought by William J. Connell, in the Superior Court of Cook county, against the Pennsylvania Railroad Company, to recover damages for a forcible expulsion from appellant's car, at Tacona, a station a few miles east of West Philadelphia, on the 16th day of December, 1880. On a trial of the cause before a jury, the plaintiff recovered a verdict, and judgment for \$15,000, which was affirmed in the Appellate Court.

It appears from the evidence introduced on the trial, that the Wabash, St. Louis and Pacific Railway Company operated a line of railroad from Omaha to St. Louis, and that appellant operated a line of road from Philadelphia to New York. The Wabash Railway Company had for several years been in the habit of selling coupon tickets to passengers, from Omaha to New York, over its own line and the lines of the Ohio and Mississippi, the Marietta and Cincinnati, the Baltimore and Ohio, the Philadelphia, Wilmington and Baltimore, and appellant's line. On the first day of December, 1880, appellant sent the Wabash company a message by telegraph, as follows:

“*December 1, 1880.*

“*George H. Daniels, W., St. L. and P. Ry., St. Louis, Mo.:*

“On receipt thereof, please discontinue sale of tickets to all points north and east of Philadelphia reading *via* Baltimore and Ohio Railroad and this line. Please answer.

L. F. FARMER.”

The Wabash company received the message, and replied as follows: “Tickets reading *via* Baltimore and Ohio Railroad to all points east and north of Philadelphia have been ordered off sale.” The Wabash notified the Baltimore and Ohio road of the action of appellant, and in reply received the following:

“*BALTIMORE, MD., December 2, 1880.*

“*To George H. Daniels, Wabash Ry., St. L.:*

“Please get up, quickly, tickets New York and points east by B. and O., and Boundbrook route trains run Chicago and Cin'ti,

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N. Y., without change. Coupons should read Balto., Phila., Boundbrook R. R., Phila. and Reading R. R., Phila. and Boundbrook Central R. R., New Jersey, Boundbrook, N. Y. Until you get them on, continue sales Penn. R. R., tickets by B. and O., reporting entire proportion east Baltimore to B. and O.; we are exchanging, and will protect. Answer.

L. M. COLE."

On the 7th day of December, 1880, the Wabash company, at Omaha, sold appellee, who had no notice of the action of appellant, a coupon ticket from Omaha to New York, reading *via* Baltimore and Ohio and appellant's line, for the sum of \$38.05, which was paid. Appellee left Omaha on the 7th day of December; arrived at Washington on the 9th; he remained there a few days, and then resumed his journey; reached Philadelphia on the 16th, where he took passage in appellant's cars for New York. When the conductor came into the car in which appellee had taken passage, his ticket purchased at Omaha was presented, and refused. The conductor notified appellee that the ticket was not good on that road, and demanded fare, which appellee refused to pay. The train was stopped at Tacona, a regular station, and appellee requested to leave the train, which he refused to do. The conductor then put him off, using such force as seemed necessary for that purpose.

[Omitting a minor question.]

But the instructions in regard to the measure of damages present a more serious question. In regard to the damages, the court in substance, directed the jury that the plaintiff was entitled to recover compensation for loss of time, or actual pecuniary loss, as the result of being forcibly ejected from the train; also such sum as will compensate for injuries to the person resulting from being forcibly ejected from the train and for bodily pain. The conductor had been ordered by his superiors not to receive a ticket for fare over the road like the one presented by appellee, and when, in the discharge of his duty as conductor, he called upon appellee for fare, and the ticket was presented, he notified appellee that he could not receive the ticket, and at the same time informed him that he must pay fare to New York. This, appellee refused to do, and then the conductor notified him that he must pay the regular fare or leave the train. Appellee refused to pay or leave the car, and the conductor stopped the train at a regular station and put appellee off

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by force, but it does not appear that more force was used than was necessary. This was, in substance, the transaction. If it be true that appellee, by virtue of his ticket, was entitled to be carried over appellant's road, the question presented is, whether he can recover damages for being forcibly expelled from the train, or was it his duty, when notified by the conductor that he would not receive the ticket, to pay his fare under protest, or leave the train and hold the company responsible for the expulsion, without compelling the conductor to resort to force. Had appellee paid the fare demanded, he might have sued the company and recovered for a breach of the contract. Had he left the train when the conductor refused to receive the ticket and ordered him to leave, he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train; but can he recover for the force used by the conductor, which he by his own act induced the conductor to resort to in order to put him off the train?

A question similar in principle to the one involved in this case arose in *Chicago, Burlington & Quincy Railroad Co. v. Griffin*, 68 Ill. 499, and it was there said: "If a passenger pays his fare to a certain station, and the ticket agent inadvertently gives him a ticket to an intermediate station, the demand of a fare a second time by the conductor will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying on such demand, his action will be as complete as if he resists the demand and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. It is his duty to pay the fare demanded, and if the company fails to make suitable reparation for the indignity, he can maintain his appropriate action." In *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; s. c., 20 Am. Rep. 232, Reed had purchased a ticket for a particular berth in a sleeping car, and had lost it after entering the car. He refused to pay a second time, and was forcibly expelled, after producing proof that he had purchased a ticket for a berth. A verdict of \$3,000 was held to be excessive, and it was also held that the plaintiff was only entitled to recover the price paid for the ticket, and reasonable compensation for the trouble and inconvenience he suffered by being deprived of a berth in the sleeping car. See also *Hall v. Memphis & Charleston Railroad Co.*, 15 Fed. Rep. 57.

In the case first cited, it was expressly held by this court that

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where the passenger paid on demand of the conductor, his action will be as complete as if he resists and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton. When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare, and in leaving the train on the command of the conductor, and had he done so he would have received no personal injuries, and might then have brought his action and recovered, as before stated; but when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntarily brought upon himself. The conductor was ordered by his superior not to receive a ticket like the one presented. This order he was bound to obey, and so far as appears he acted in good faith, and when appellee was notified by the conductor that his ticket was not good, and would not be received, it was his duty to leave the train in a peaceable manner and hold the company responsible for the consequences, rather than resist or undertake to retain his place on the train by force. A train crowded with passengers—often women and children—is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise, and dangerous to the travelling public, to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train, and seek redress in the courts, where he will find a complete remedy for every indignity offered, and for all damages sustained.

The instructions in reference to the damages we regard erroneous, and for this error the judgment will be reversed and the cause remanded.

Judgment reversed.

MULKEY, J., dissenting.

St. Louis National Stock Yards v. Wiggins Ferry Company.

NOTE BY THE REPORTER.—To the same effect *Townsend v. N. Y. Cent. R. Co.*, 56 N. Y. 295; s. c., 15 Am. Rep. 419.

The case of *Lake Shore, etc., Ry. Co. v. Pierce*, 47 Mich. 277, is exactly in point and in harmony with the principal case. The court said:

“But this did not necessarily give him a right to remain on the train after he had been told it would not stop at Batavia. Whatever remedy he may have against the company for its breach of contract, he had no right to determine for himself on what train he would travel. The business of railroads can only be carried on safely by having regularity. If trains are arranged in a certain way, and their time fixed with regard to limited stoppages, a conductor would never be safe, if he were bound at his peril to ascertain from any mere stranger the existence of an agreement by the company to change the arrangement and stop at an unusual place. A passenger cannot compel a conductor to deviate from his appointed scheme, and if truly informed concerning the rule as to stoppages, he is bound to conform his own movements to it, and seek redress in some other way. Every one is bound to know that the conductor is not invested with general power to run his train as he pleases, and that so far as he is concerned, trains must conform to the schedule.

“Pierce ought to have left the train at Bronson, and then if not furnished with passage to Batavia, the expense of a proper element of damages in addition to such, if any, as were occasioned by the failure to take him through on the train which he was told he could take, and the consequent delay. He ought to have known that if he persisted in remaining on the train the conductor would probably remove him, and such a removal was not a distinct wrong in itself, because after leaving Bronson he was wrongfully on the train. He could recover no damages unless for some unlawful violence beyond the necessities of the removal, because it was lawful to take such steps as were necessary to remove and keep him removed from the train. He cannot complain of an indignity which it was his duty to avoid incurring, and which he was bound to expect.”

ST. LOUIS NATIONAL STOCK YARDS V. WIGGINS FERRY COMPANY.

(113 Ill. 334.)

Statute of frauds — license — part performance.

A mere oral license to construct a railway track over the land of another, as distinguished from an oral agreement of sale of the right of way, cannot be enforced in equity, even after the expenditure of a large sum of money in constructing the road on the faith of it.

BILL for conveyance and injunction. The opinion states the facts. The defendant had judgment below.

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John B. Bowman, A. S. Wilderman and R. F. Wingate, for appellant.

Charles W. Thomas, for appellee.

SHELDON, J. The arrangement under which the embankment and railroad track in question were constructed, was made with S. C. Clubb, the superintendent of the Wiggins Ferry Company. Question is made as to what was the character of that arrangement, it being contended on the side of the appellant that it was a contract of sale of the right of way. But that we do not regard as now an open question, under the decision of this court in the action of forcible detainer referred to in the bill which was brought by the ferry company against the appellant, wherein it recovered judgment for the possession of this railroad track, and which came before this court on appeal from the Appellate Court for the fourth district. See *St. Louis National Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514. We there held that it was a controverted question of fact in the case before the Appellate Court, whether such agreement was a contract of sale of the right of way, or but a mere license, and that it must be taken that that court had determined it to be a license, which was a finding of fact that was conclusive upon the Supreme Court, and leaving as the only question for its decision, whether the ferry company was estopped from revoking the license, and if so whether the estoppel could be made available in the action at law. Only the latter branch of the question was decided, that such an estoppel could not be availed of in an action of law, but only in a suit in equity, and the judgment was affirmed without in any way passing upon whether there was such an estoppel in this case or not. We must take it then as an adjudicated fact not liable to be controverted again, that there was here but a mere license to construct this railroad track, and the question presented for determination is, whether under the circumstances of this case, after the execution of the license by the construction of the railway track at a considerable expenditure of money, the ferry company is estopped from revoking the license.

The proofs show that the railway track in question was constructed in pursuance of an arrangement made with S. C. Clubb, the superintendent of the Wiggins Ferry Company, in the manner

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and at the cost as stated in the bill; that Clubb had no authority to execute any agreement or writing pertaining to the ferry company's real estate, but in all cases where there were deeds or leases to be executed, they were executed by the president and secretary of the company under its seal; that appellant first made survey of a line for the track, which was not satisfactory to Clubb, and at his instance the line was changed to meet his approval, and so as to run about two hundred and fifty feet north of and parallel with Stock Yard avenue. The track was built upon an embankment, which at first was made only three feet high, but the next year or the year after was raised three feet higher because of danger from overflow. The track was first laid with iron rails, and was afterward relaid with steel rails. The track was put down as a permanent track and well built, with a permanent bridge across Cahokia creek. On May 6, 1875, prior to the making of this arrangement with Clubb, he signed as superintendent, a writing giving authority to appellant to construct a sewer from its stock yards, across the land of the Wiggins Ferry Company, to the Mississippi river. On May 24, 1878, the Wiggins Ferry Company, by its deed, executed in its behalf by S. C. Clubb, its president, under its corporate seal, and attested by its secretary, conveyed to the Wabash railway company a strip of land one foot wide, in bounding which it was described as extending from the south line of the town of Brooklyn, southwardly, "to a line thirty feet northwardly from and parallel to the center line of a railroad track, defined on the plat hereto attached as stock yard company's track to stock yards." That named track is the connecting track located on the land in dispute.

It appears that at the time of the giving of the license by Clubb, (June 19, 1875), appellant was in negotiation with the Connecticut Land Company, which owned United States survey 626, for a right of way sixty feet wide over that survey, south of Stock Yard avenue, which negotiation had proceeded to the setting of a price by the company upon the land, which appellant was considering, and the connections at the other end, and that survey 626 was all sold to railroad companies other than named in the bill prior to 1880, and subsequent to June 19, 1875.

The evidence on the part of appellant tends to show that in giving the license there was in view the benefit of the connecting track to the ferry company in having lots of two hundred and fifty feet

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in depth running back from Stock Yard avenue to the track, which might be valuable for manufacturing purposes. The embankment and connecting railway track were constructed, at a considerable cost, upon the faith of the license from Olubb, and although he was without authority to dispose of the ferry company's lands, it must be taken under the proofs that the track was constructed and operated with the knowledge and acquiescence of the company, and there is evidence tending to show that anticipated benefit to the ferry company's land, from having lots to abut on the connecting track, somewhat entered into the consideration for giving the license. The circumstances might well, under the decisions of some courts, constitute an estoppel *in pais* against the revocation of the license, on the ground that to revoke it would be a fraud, after such an expenditure of money upon the faith of the license, and there would be compelled specific performance, by deed of the right of user, as of a contract in part executed. But there was a contrary rule established in this State in the case of *Woodward v. Seeley*, 11 Ill. 157; s. c., 50 Am. Dec. 445, where it was decided that a license coupled with an interest in land must be in writing; that a license perpetually to overflow one's land would create an interest in the land, and the license could not be granted by parol; that a court of equity would not enforce a parol license to overflow the lands of the licenser, even in favor of a party who had acted in good faith upon the parol license, and made valuable improvements upon his own land, which would become worthless if the license was revoked. That was the case where an upper proprietor had induced another party to purchase a water privilege immediately below, and improve it by the erection of a mill, at a cost of some \$5,000, upon a parol promise that he might overflow the land of the upper proprietor. After the purchase of the land and erection of the mill below, the licenser revoked the parol license, and he was sustained, in equity, in so doing, although the lower mill was worthless without the privilege of overflow. It was admitted there was a conflict in the authorities, and after a review of them to quite an extent, the court arrived at the decision it did, as upon principle. It was there said: "It makes no difference that the complainants may have acted upon the parol license, and erected valuable buildings, which will become worthless in case the license is revoked, before acting so imprudently they should have acquired permission by deed to overflow the land of the defendants. Nor can the complainants call upon a

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court of equity to enforce the license upon the ground that they have made valuable improvements, and expended their money, relying in good faith upon it." It was thought not to be like the case of a parol purchase of land, where, upon part performance, a court of equity will depart from the statute of frauds, and compel the vendor who has received the purchase-money to make a title to the land; that to enforce the license there would be a still further departure from the statute, by extending a doctrine originally of doubtful propriety.

Russell v. Hubbard, 59 Ill. 335, where an owner had given verbal permission to use the brick wall of his house for the purpose of attaching thereto a new brick building to be erected on the line of an adjacent lot, and the new house was built of brick and attached to the wall of the other, as permitted, and it was held the party giving the license was estopped from its revocation by reason of its being executed, seems somewhat at variance with *Woodward v. Seely*, but does not profess to overrule or question it. In *Kamphouse v. Gaffner*, 73 Ill. 453, we said *Russell v. Hubbard* must either be limited to cases of party wall, or be considered as overruled; and in *Forbes v. Balenseifer*, 74 Ill. 183, it is rather intimated that *Russell v. Hubbard* is to be limited to the particular facts of that case. *Woodward v. Seely* has never been overruled or directly questioned by this court, that we are aware of, and we think it must govern this case. It has stood so long as the rule in this State that we are disposed to adhere to it, without entering upon consideration of whether or not it might be the proper one to adopt were the question now an original one before this court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WALKER, DICKEY and CRAIG, JJ., dissenting.

ON APPLICATION FOR REHEARING.

MULKEY, J. After a very careful reconsideration of this case a majority of the court adhere to the conclusion reached upon the former hearing, as expressed in the opinion already filed in it.

The case of *Woodward v. Seely*, 11 Ill. 157; s. c., 50 Am. Dec. 445, cannot be distinguished from the present one, and the authority of that case, standing, as it does, in line with the decided weight of

authority, has been too long recognized by this court as a correct exposition of the law upon the question involved, to be now overruled without any special reason for doing so. A contrary conclusion cannot be placed upon any grounds, however plausible, which are not fully met by the *Woodward-Seely* case, and many others adopting the same view of the law. Moreover, the conclusion reached is in harmony with other well settled principles of law. The contrary view is not. The right to build a railroad track and operate it upon the land of another is an interest in land which can only pass by grant, and an agreement to convey such a right, if not in writing, is clearly within the statute of frauds. If however a party, verbally contracting for such right, enters upon the land and expends money in building the track, upon the faith of the owner's verbal promise to convey, and he otherwise performs or offers to perform his part of the agreement, such performance or partial performance will, as in other cases, take the case out of the statute, and a court of equity will decree a specific performance of the agreement; but in this case we start out with the proposition conceded there was neither a conveyance nor a promise to convey. Specific performance, as an equitable remedy, by its very terms presupposes the existence of a contract between those through whom they claim, for it were absurd to talk of the specific performance of an agreement that has no existence. In the case before us it has been solemnly adjudicated that the railroad track in question was not constructed under any contract, promise or agreement on the part of the Wiggins Ferry Company to convey the right of way to the appellant, and that in building the track the latter was acting under a mere license. It follows therefore that so much of appellant's argument as is based upon the assumption there was such an agreement, is not warranted by the record, and as this assumption has no foundation in fact, the argument based upon it must necessarily fail.

The only material question in this suit not settled by the former case between the parties (reported in 102 Ill. 514) is, whether conceding, as we must, appellant entered appellee's premises and built the track in question under a mere parol license from the Wiggins Ferry Company, the latter has at any time been guilty of such conduct as to estop it from asserting its right to the possession of the land upon which the track is built. If any such estoppel exists, it is what is known as an estoppel *in pais*, and consists in appellee

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having said or done something whereby appellant has been misled to its injury if the license is revoked. Now, it is clear that outside of the fact of revoking the license there is no ground for the claim that appellant has in any way been deceived or misled by appellee. Permission was given to build the track at the place it was built, and it was probably built about as both parties supposed it would be. No deception was practiced, so far as we can perceive, by either of the parties, and none has been suggested. It was a plain, common business transaction. No compensation on the one hand was asked for the right of way, nor was any guaranty asked on the other side as to the length of time this right of way should be enjoyed. Probably both parties supposed the operation of the road would be mutually beneficial, and that that would be ample security against appellee revoking the license on the one hand, and against appellant removing its track on the other. If appellant saw proper, as it did, to enter upon appellee's land and spend money in constructing its track, upon a mere parol license, which as matter of law it is conclusively presumed to have known was revocable at the pleasure of appellee, it was its own folly. The case in this respect does not differ in principle from any other where the licensee has expended money in connection with his entry upon land of the licensor. Indeed this most generally occurs. Suppose under the circumstances, appellant had concluded it was to its interest to take up the track altogether, it unquestionably would have had the right to do so, however much appellee may have been injured in consequence of it. On principle it would seem there ought to be some mutuality in this respect. The only thing about which appellant can have the slightest pretense for the charge that it has been misled to its injury, is the bare fact that appellee has exercised the right of revocation, when it was perhaps, thought it never would. It is hardly accurate, under the circumstances, to say appellant was misled, for unless the mere grant of the license to build the track was an implied undertaking to never exercise the right of revocation, appellant was not warranted in assuming appellee would never exercise such right, and if appellant's expectations in this respect have not been realized, it was simply disappointed, rather than deceived, by the revocation. To say that the license is irrevocable because the thing permitted to be done necessarily involved the expenditure of money, would be going beyond the most extreme views on the subject, and make most licenses irrevocable. The

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practical effect of such a doctrine would be to make most licenses conveyances of an interest in land by mere estoppel *in pais*. *Ultra* as this view manifestly is, if we stop short of it the present appeal cannot be maintained. Such a decision would establish the rule that all licenses founded upon a valuable consideration, or necessarily involving the expenditure of money, would be irrevocable, which would practically destroy the distinction between a license and a grant. To go to this extent would be to overrule all this court has ever said on the subject, and place it in direct antagonism with the overwhelming current of authority. This we are not prepared to do.

Rehearing denied.

CASES
IN THE
SUPREME COURT
OF THE
DISTRICT OF COLUMBIA.

WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION V. WOOD.

(4 Mackey, 12.)

Insurance — life — husband for wife — right to.

An insurance on the life of a husband was payable to his wife or her legal representatives. The husband paid the premiums, and he had the right to change the beneficiary by consent of the insurers. The wife died, and subsequently the husband. *Held*, that the insurance money belonged to the husband's estate. (*See note, p. 255.*)

BILL to determine rights to insurance money. The opinion states the case.

J. J. Johnson and B. F. Leighton, for Jones' administrator.

Edwards & Barnes, for appellant.

WYLIE, J. This is a bill of interpleader brought by the complainant against two parties for the purpose of having the court decide to which of the two a certain fund belongs. In 1878 Daniel Spaulding Jones became a member of the Washington Beneficial Endowment Association of the District of Columbia, paid his fee of initiation and bound himself to pay any dues that

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might be assessed upon him afterward for the purpose of meeting the necessities of the company.

This Beneficial Endowment Association is a life insurance company on the mutual plan. The members contribute so much on joining, and when one dies his estate is entitled to a certain fund to be paid by the society, and there is an assessment made upon the members for the purpose of making up that fund. Every man who becomes a member of the association, besides paying his initiation dues is liable to these calls on the death of his associates, and when he dies the other contributors make up the amount due to his estate.

The certificate of membership recites as follows:

“In consideration of the representations made to the Association in said application and the agreement and the conditions above set forth, all of which are hereby accepted and made part of this contract, and in further consideration of the sum of five dollars in cash, and a note for eight dollars, receipt for which is hereby acknowledged, the Washington Beneficial Endowment Association hereby agrees with the said Daniel S. Jones to pay, unless the beneficiary be changed as hereinafter provided, to Katie Wood Jones, or her legal representatives, the sum of five hundred dollars within sixty days after satisfactory proof of the death of said Daniel S. Jones has been received and accepted by this Association provided, etc.”

“It is further agreed that no change in the beneficiary named herein, nor assignment of this certificate, can be made without the consent of the board of trustees of said association, and under such conditions as they may prescribe.”

Kate Wood Jones was the wife of Daniel Spaulding Jones. The contract however was made with the latter. The trust was to pay to Kate Wood Jones, the wife, or to her legal representatives, the amount of \$500 within sixty days after the death of Daniel S. Jones. It is a trust then in the Beneficial Endowment Association declared by the husband for the use of his wife, he paying all the consideration, and the contract was with him and not with her. The contract contained a provision that with the consent of the society he might change at any time the beneficiary. He had a right to revoke the interest of his wife and name somebody else as the beneficiary. So that the contract was with him and constantly within his power to change in that respect.

Jones' wife died about two years before he did, and her legal representatives claim the \$500 because the language of the contract was that the money was to be paid to her or her legal representatives.

If there was no question of the legal representatives there could be no doubt at all that this would be a failure of the trust, and therefore it would be an end of it. The resulting trust would take place in favor of Mr. Jones' estate. At section 1200 of Story Equity Jurisprudence, that doctrine is laid down, and it is a well-established doctrine both as to real and personal estate as to deeds and as to wills. When the object of the trust fails, there is a resulting trust to the grantor. Mrs. Jones dying, it failed as to her, and the question is whether her legal representatives are in any better situation than she was.

In the analogous case of a lapsed legacy, the rule laid down in the books is this, as I shall read from the first volume of Roper Legacies, page 466:

"The well-established rule respecting lapse through the death of the legatee in the testator's life-time, in cases not affected by the above statute will not be varied by the bequest being made to the legatee, his executors or administrators. For such words are of no importance, inasmuch as those persons would have taken the legacy in succession and by representation, if it had been vested in the legatee, whether expressly named by the testator or not; but since the legatee's death before the testator prevented his ever taking any interest in the bequest, it follows that his executors or administrators can by no possibility make a title to that which never rested in the testator. This is the principle of the rule, which equally applies to devisees of real as to bequests of personal estate; so that if lands were devised to A. and his heirs, and he died before the deviser, leaving an heir living at the death of the testator, the heir could not make a title to the estate, because he was intended to take it in succession as representative of the devisee, but which was impossible from the accident of the latter dying before the deviser."

Further, on the same subject, on page 467, the text says:

"Since then a legacy to A., his executors and administrators, will as we have seen, lapse by his death before the testator, so will a legacy given to A. and his personal representatives; for in each case the additional words are unnecessary and merely express what

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the law would have directed if the testator had been silent on the subject, viz., that if A. survive the testator (an event which the gift implies, since no testator could be supposed to mean to give to any but those persons who shall survive him), and afterward die before the legacy becomes payable, his personal representative shall receive it. Hence it appears that the mere naming of the executors, administrators, or personal representatives of A. is not inconsistent with the rule before mentioned respecting the lapse of legacies, and does not unequivocally show the testator's intention to substitute those persons in the place of A. in the event of A.'s death before him."

As this is a trust, it is to be construed according to the circumstances surrounding the case. If a man buy a piece of land or other property and takes the title in the name of his son, the presumption will be that it was intended as an advancement to the son. It does not follow necessarily that the title being in the name of the son, the son shall have it. The father may have intended it as an advancement. But the courts will receive evidence upon that subject whether it was intended as an advancement or not, and if it was not intended as an advancement then the father would have it because he paid the money.

So in looking at these questions of trust, the court will consider all the surrounding circumstances of the case, and when proper and necessary it will receive parol evidence for the purpose of ascertaining the intentions of the parties. In this case we think that no parol evidence could have made the case any clearer than the circumstances upon the face of the transaction. The beneficiary was the wife of Daniel Spaulding Jones. He intended to leave this for her benefit after his death. The fact that he survived her was a fact which he had no contemplation of at the time. The paper did not provide for what did happen, and there is nothing in the case to show that there was any person who could take from her, or who was considered by him in the matter as taking in case of her death because she had no children, she had no distributees, no near relations. There is no evidence at all to show that there were any persons in the relation of distributees to the wife in whom he felt any interest at all.

So that we are obliged, from all the circumstances, to come to the conclusion that this trust was a trust intended for the wife alone, and that the words "legal representatives," as here used, have no

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signification different from that which is attributed to those words generally in the law ; that is persons appointed, either by will or by the law, to administer upon her estate after her death. That being the view of the court, we think that her legal representatives could not possibly take any thing in this case, because she herself died before the intestate, her husband, and there was a failure therefore of the trust. The fund therefore resulted to the husband, and his estate is entitled to the money.

The decree below is affirmed.

CARTER, C. J., and JAMES, J., dissented.

NOTE BY THE REPORTER. —The facts and the ruling in *Kerman v. Howard*, 23 Wis. 108, were precisely like those of the principal case.

The court said "On the part of the infant plaintiff it is contended, that where a husband effects an insurance of his own life for the benefit of his wife, and himself pays the premiums, since the insurance is for the benefit of a married woman, the husband, though he survives the wife, has no power or authority whatever over the policy, but that it goes to her children like her separate estate. * * * But when the husband survives her we do not think the statute intended to deprive him of all power over the policy. Suppose he wished to change the policy in favor of some other person, could he not do it with the consent of the company? He might wish to use or assign the policy as a means of credit or security. He might not wish to continue the payments, by which the policy was kept alive, and thus abandon the policy altogether. Would he not have the right to discontinue payment of the premiums, and let the policy lapse? It seems to us that he would, or that he might bequeath or assign the beneficial interest in the policy as he might think proper.

"This right to dispose of the policy he would have in the absence of the statute, and we do not think the legislature intended to deprive him by that provision "

But in *Sloan v. Snow*, 11 Allen, 224, where the policy was payable to the wife, her executor, administrators or assigns, and she died first, her administrator was held entitled to the insurance money as against the husband's administrator, although the husband had paid the premiums after her death. The question was not discussed in the opinion, but it simply says, "it vested from the time of her death in the administrator of her estate, for the benefit of her children."

MCGILL V. DISTRICT OF COLUMBIA.

(4 Mackey, 70.)

Municipal corporation — negligence — failure to fence area.

The law requires all areas in the city of Washington to be protected by railings, with an allowance of four feet for an opening or entrance. The property in question had an area along its entire front, but had no railing. The plaintiff fell into the area and was seriously injured. *Held*, no defense that he fell into the area at a point where the opening or entrance would have been had a railing been erected.

ACTION for personal injuries by negligence. The head-note states the point.

S. S. Henkle and C. Maurice Smith, for plaintiff.

A. G. Riddle and Francis Miller, for defendant.

MERRICK, J. [Omitting other questions.] The main point in the case arises upon the prayers made by the defendant, to the effect that the place where the accident happened being an area in front of a house, and the immediate point of the accident being in front of the door of the basement to which that area led, that that part of the area was a privileged point in the area, and that unless the plaintiff showed to the jury that the fall occurred at some other point of the area than that in front of the door, the defendant was not liable. This court does not so understand the law of the case. The only building regulation which has been referred to is contained in the record and is in these words :

“Areas must be protected by iron or stone railing at least forty-two inches in height ; and where they extend the entire width of any lot frontage, shall be protected by said railing, with openings or gates four feet wide.”

There is nothing in that, and that is the only ordinance or building regulation on the subject, which grants, as a matter of right, that the party shall have in the area an opening directly at right angles to the walk and in front of the door. And it is well known, as a matter of fact, that in a large portion of the cases where areas are used in this city, the opening is not made immediately opposite to the door, but on the side, or in some other relative position toward the door.

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Where an area is made as this was along the entire frontage of the lot, with a requirement that in such case it shall be protected by a railing, with openings or gates four feet wide, in the absence of a conformity to that regulation the whole area is an illegal area from beginning to end, and there is no right whatsoever for a party who has thus made an area which is illegal throughout its whole extent, to say that he had the privilege of exemption from liability for his violation of law because an accident may have happened in front of the door. There is no dedication, where an area is made to that extent, of any particular part of it for the uses of the building to which it is supposed to be subordinate. But, on the contrary, so far as the facts of this case disclose, here was an area eighteen feet in length, the entire frontage of the building, with steps of equal length, thus inviting, and so far as the party himself could do, dedicating the entire extent of that area as an adit to that building, in violation of the law, and thus taking away from him any pretense that he had especially dedicated, according to a supposed privilege, a particular part of the area as an adit to that building. He is himself practically estopped from saying that he had dedicated that particular portion in front, since he had made the whole stairway down that area equally the means of approach to the doorway of that house.

It is all-important, whatever may be the hardship in the particular case, that the areas of this crowded city, becoming more and more crowded, which have been dedicated to the uses of the public, should not be subordinated to the particular objects of gain, pleasure or otherwise of the occupant of a particular house. The rights of the individual are held in subjection to the rights of the public, and it is the duty of the court, however painful it may be in a particular instance, to hold up the rules of law with a stern and unflinching hand in order that the rights of the public may not be violated under any gradual encroachments created by the greed of those who happen to own property along the line of the highway. Individual interest is secondary always to the public right and the public good.

For these reasons, the court holds that this area being illegal throughout, an accident in any part of it is an accident for which the public authority is responsible; and the judgment of the court below, being without error, must be affirmed.

Judgment affirmed.

Fisher v. Lighthall.

FISHER v. LIGHTHALL.

(4 Mackey, 82.)

Landlord and tenant — implied covenant that premises are habitable.

There is no implied covenant on the leasing of a furnished house that the premises are habitable.*

ACTION for rent. The opinion states the case. The plaintiff had judgment below.

George E. Hamilton, for plaintiff.

Fred. W. Jones, for defendant.

JAMES, J. In the consolidated cases of Thomas J. Fisher and others against Almerin H. Lighthall, it appears from the record that Fisher & Co., acting as real estate agents are accustomed to do here, executed in their own name a lease to the defendant Lighthall of a furnished house in this city at the rate of \$100 a month for one year from the 10th of November, 1883.

It also appears that the tenant occupied the premises several months, and then, claiming that they were in an uninhabitable condition, left them, and afterward surrendered the keys to the landlord, that is handed them to him, although they were not accepted by way of surrender. The defendant paid the rent up to the time he left.

Suit was brought for the recovery of the rent for the remainder of the term. The defendant's counsel offered to prove the house uninhabitable at the time of the demise by the following evidence:

“To prove by three competent witnesses that shortly before or about the 10th of November, 1883, the date of the renting, the house was well ventilated, had no fire, and appeared suitable for habitation; that the defects afterward found were then latent; that shortly after, and as soon as the furnace and range in the house had been put in order, fires kindled, and the house heated, the premises became intolerable and unfit for human habitation from the sewer gas penetrating the house from the sewers and from the illuminating gas escaping from the gas pipes, and that one or more mem-

* See *Edwards v. New York, etc., R. Co.* (98 N. Y. 245), 50 Am. Rep. 659.

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bers of the defendant's family were made ill and continued ill during the whole time of defendant's occupation of the premises, from the noxious gases and unhealthy condition of the house, made so by defective plumbing.

He also offered to prove that the premises were infested with ants from the basement to the garret, so that no articles of food could be protected from their depredations, and that these ants infested also the furniture in the house, by means of all which the house was unfit for human habitation.

The lease contains covenants on the part of the lessee that he will take the house and hold it for one year from the 10th of November, 1883, and that he will pay this rent and the gas bills and water rent bills, and that he will leave the premises in like good order in which he took them. It contains no express condition or reservation in case the house proved to be unfit for habitation at the time he took it. He claims however that the law establishes a condition — not merely a covenant, but a condition — that if a house is let furnished (for he confines himself to that), and it is not in a habitable state, the lessee may throw up the lease and abandon the premises without liability to pay rent for the property.

We were referred to the case of *Smith v. Marrable*, 11 Mees. & W. 5, decided by Lord ABINGER, chief baron of the Circuit, and afterwards adopted by the judges of the Exchequer, where a house simply designated as house No. 5 Brunswick place, London, was rented for a short period, being as a matter of fact a furnished house. Lord ABINGER held, that the party could abandon the premises on finding that the beds were incurably infested with bedbugs — that is shown to have been the meaning of the language used by a subsequent case in which Lord ABINGER commented upon this one. He dwelt upon the dual character of the letting; that it was not a letting of real estate simply nor substantially, but was a letting of a furnished house in which the furniture was one of the constituents demised. There was no specific description of the furniture to be let, and his lordship was of opinion that there was an undertaking that a furnished house should have appropriate furniture in it. That was all of the case. The objection of the lessee did not relate to any defect of the real property, but was wholly to the furniture, and the court thought that in such case there was an undertaking that suitable furniture should be substituted and if it were not the party could give up the lease.

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The principles on which they undertake to establish this seem to be very shadowy, and they begin upon a very curious basis. Baron PARK referred to two cases of this character, as showing that where premises held from year to year become untenable, the courts sustain the tenant in his abandonment of the premises without notice to the landlord. That has no application to a case of a fixed tenancy for a specific term, for the law created that tenancy from year to year and upon equitable considerations.

Resting upon such grounds as that the Exchequer sustained Lord ABINGER in his conclusions that where house and furniture were let, and there appeared to be no specific designation of the particular furniture, there was an implied undertaking that appropriate furniture should be put into the house if such furniture was not there already, and if that condition was not complied with, then the whole letting should be thrown out.

That question came up afterward, in the case of *Sutton v. Temple*, 12 Mees. & W. 52, and in the case of *Hori v. Windsor*, in the same volume, page 68, and there it is perfectly apparent that the court cut the case down to the letting of a furnished house where there appeared to have been no specific description of the furniture to be let, and where the defect had been in the furniture.

At a later period the question came up in relation to a defect in the premises of the real estate itself. The case is that of *Wilson v. Finch-Hatton*, 2 Ex. Div. 336. A lady through an agent had taken a furnished house in London to be held by her during what is known there as the season — three months. It proved when she arrived, that the house had a bad smell. She refused to occupy it and went to other lodgings, and wrote to the landlord that the house was unfit for habitation. The landlord then undertook to put it into good condition, when it was discovered that there was a cesspool under the pantry, and that under the kitchen floor there was a most frightful condition of filth that was covered up. Chief Baron KELLY was of opinion there, that where a house was let furnished for immediate occupation, under just such circumstances as I have described, there was an understanding that it should be habitable. After discussing certain principles, he said:

“I now proceed to consider whether both parties to this agreement intended that the house should be fit for occupation; that is, that it should be reasonably healthy, and so not dangerous to the life of those inhabiting it. I think that it is quite manifest that

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they did so intend, and indeed, one of the letters of the lady who intended to occupy the house (and she is practically the defendant), mentions the subject of drainage. Is it not then, clear that the tenant is entitled to find the drains in such a condition that she and her family and her servants can safely enter and live in the house? However, on the contrary, when she entered, she found that there were strong and noisome odors in the house, and that there was under the rooms in the basement a deposit of filth and fœcal substance, which it was absolutely necessary to remove before the house could be safely occupied by any one. Without doubt, a person who so enters under such an agreement as this on furnished premises in the condition just described, may at once throw up the lease and decline to pay any rent under it. Can it be that the lessee would be bound to give notice of the defects in the house to the lessor, and then to procure another temporary residence, and wait there until the lessor had completed the alterations necessary to render the house healthy? I am of opinion that if such were the law of England it is time that it should be altered. But the law is not so," he added.

That then, is the only case cited to us in which a defect to the real property was held to be a ground on which the party could abandon the lease without paying the rent; in other words, the only case in which such a defect was held to be a condition to the letting.

In the other cases the court expressly disclaimed any intention to apply this rule to the letting of real property as a rule appropriate in such cases, and they applied it only on the ground that there was coupled with it a condition implied from this contract about the furniture.

The same question has come up in this country. The later English cases have declined to apply that doctrine, and the American cases have followed these later cases.

There is a very marked case in 9th Cushing,* where the court quote from the Exchequer Court decision, and they express the opinion that under such a condition of letting, the health of the premises might not seem to be an unreasonable rule in such cases, yet it was not in the power of the court to establish such a rule; that parties are to be left to make their own contracts, and where they have done so the courts will not undertake to introduce new

* *Dutton v. Gerrish*, 9 Cush. 89. SHAW, C. J., there says the authority of *Smith v. Marrable* "has been greatly shaken if not overruled."—REP.

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terms into a written contract. We constantly insist upon that with regard to all other contracts where they are supposed to set out the full intention of the parties, and certainly it is quite as reasonable to do it in respect to the letting of land where the contract is generally made with peculiar deliberation.

I have to remark that although it might seem to be a reasonable condition, and if we had to establish the law for the first time we might think it was a reasonable condition for the courts to enforce, that property for human occupation should be understood between the parties to be at least healthy; yet parties choose to make their own contracts and we must leave them to that. It is safer, on the whole, and the ordinary principles applicable to other cases of written contracts are just as applicable and as reasonably applicable here.

Furthermore, it may be said that great inconvenience on the other hand might arise from an attempt of the courts to introduce this principle. About as much fraud would arise in the attempts of tenants to break up the lease when they found the premises were disagreeable as when the premises were not disagreeable. It is better therefore that parties must make their own contracts and protect themselves. The law does not undertake to treat contracting parties as requiring nurses. We must apply here the ordinary rule which has always been understood to regulate the contracts of parties to the letting of houses, viz.: that there is no implied contract or condition that the premises shall be habitable.

The judgment of the court below is affirmed.

Judgment affirmed.

GIBBONS V. MAHON.

(4 Mackey, 120.)

Stock — dividends — increase of capital — life tenant and remainderman.

A will bequeathed corporate stock in trust to pay the dividends to the testator's daughter for life, "without diminution of principal." The company having doubled its original capital from its earnings, issued additional stock, after the testator's death, to the amount of this increase, and divided it among the stockholders in proportion to the amount originally held by them. *Held*, that the life-tenant had no right to this new stock. (See note, p. 264.)

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BILL for construction of a will. The opinion states the case.

Riddle, Davis & Padgett, for complainant.

J. Hubley Ashton, for defendant.

JAMES J. This was a bill filed to obtain the construction of a will. The case was heard on bill and answer. It appears that the late Ann W. Smith, of this District, left by her will, among other things, 280 shares of the stock of the Washington Gas-light Company to Jane Owen Mahon in trust for the complainant. The paragraph of the will referred to is as follows:

"I hereby give, devise and bequeath to my daughter Jane Owen Mahon, wife of David W. Mahon, of the city of Washington aforesaid, and to her heirs and assigns, two hundred and eighty shares of stock of the Washington Gas-light Company (and some other things) in trust for the advantage and behoof of my said daughter Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her life-time, without percentage of commission or diminution of principal. And in case of the death of the said Mary Ann Gibbons, then the said stock, bonds and income, shall revert to the estate of my said daughter, Jane Owen Mahon, without encumbrance or impeachment of waste."

The answer shows that the accumulated profits of the gas company were, from time to time, expended in extending the plants of their works, and that in the meantime dividends were declared and paid, and that the latter were regularly paid over to the *cestui que trust* by the defendant.

After the plant had accumulated so that it was double its original value, Congress, by the act of May 24, 1866, increased the capital stock of the gas-light company to \$1,000,000, for which the company was authorized, of course, to issue stock. Two hundred and eighty additional shares were issued to this trustee, and upon the whole, the original and the new two hundred and eighty shares, she continued for some years to pay the dividends to the *cestui que trust*. But now the *cestui que trust* claims that these two hundred and eighty shares should be transferred to her on the ground that as they represent profits earned and declared by the company, they really belong to her under the terms of the will.

As a proposition of law, a corporation has a right, within reasonable grounds and in good faith, to reserve and apply its profits to the increase of the plant, and the stockholders hold their stock subject to this right. The company is the legal owner of the whole plant and of the capital in trust, of course for the stockholders; but the stockholder is entitled to the profits only when the company, acting in good faith and reasonably, shall divide them; but not until then.

These earnings then went into the plant and were not divided. The company lawfully reserved them. When under this act of Congress, it came to issue new stock, the stock was in no sense a dividend. Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares this trustee held precisely the same interest in this increased plant in the capital of the corporation that she held afterward. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of new shares. A dividend is something with which the corporation parts. But they parted with nothing in issuing this new stock. They simply gave a new evidence of ownership which already existed. They were not in any sense therefore dividends for which this trustee had to account to the *cestui que trust*. She stood after the issue of the new shares just as she had stood before, and the trustee was obliged to treat them just as she did, namely as a part of the original, and to pay the dividends to the *cestui que trust*.

It is hardly worth the while to dwell upon any other proposition. We are of the opinion that these new shares were simply representative of the interest that the trustee already had in the *corpus*. They were not, in any sense, a dividend. They came into her hands in trust just as the old shares came into her hands; and as we have said, are in fact but an additional representative of a *corpus*, which before this issue was represented by the original shares of stock. The life legatee is entitled to receive therefore only the dividends declared on all of these five hundred and sixty shares. The *corpus* itself is held by the trustee for the benefit of the remainderman.

NOTE BY THE REPORTER.— To what extent a life tenant is entitled to stock dividends has not been settled with any degree of uniformity. The decisions of the different States are hopelessly irreconcilable. The correct doctrine and one that has the support of the best authority, is that dividends derived from

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the earnings of the company, no matter when such earnings or profits were realized, belong to the life tenant if they were declared during the existence of his estate, even though they are stock dividends. *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 80 Barb. 637; *Estate of Woodruff*, 1 Tucker, 58; *Riggs v. Cragg*, 26 Hun, 89-103, *Earp's Appeal*, 28 Penn. St. 868; *Wiltbank's Appeal*, 64 Penn. St. 256; s. c., 8 Am. Rep. 585; *Vinton's Appeal*, 99 Penn. St. 434; s. c., 44 Am. Rep. 116; *Moss' Appeal*, 83 Penn. St. 264; s. c., 24 Am. Rep. 164; *Lord v. Brooks*, 52 N. H. 72; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Scovill v. Roosevelt*, 5 Redf. 121; *Pierce v. Burroughs*, 58 N. H. 302; *Cragg v. Riggs*, 5 Redf. 82; *Miller v. Guizard*, 67 Ga. 284; s. c., 44 Am. Rep. 720; *Richardson v. Richardson*, 75 Me. 570; s. c., 46 Am. Rep. 428; *Rand v. Hubbell*, 115 Mass. 461; s. c., 15 Am. Rep. 121.

In the case of *Riggs v. Cragg*, as decided at General Term, it appeared that a stock dividend was declared of funds which had been accumulating for twenty years, more than ten years before the estate of the life tenant vested in him. The question presented was whether these shares of stock which represented such dividend belonged to the life tenant or the remainderman. The court decided that they were the absolute property of the former. "When this accumulated fund was acquired was not otherwise made to appear than by the statement of it contained in the resolution, an investigation was instituted for the purpose of ascertaining the fact, but no evidence could be obtained by means of it which warranted the conclusion that any assignable proportion of it had been earned before the death of the testator. But even if evidence of that nature had been given, it could not very well have produced any change in the determination for the reason already stated, that dividends are not apportionable, but are legally considered as accruing only from the time when they may be declared. This dividend was declared nine years after the estate had passed into the hands of the executors. And if it is to be considered as a dividend under the terms made use of by the testator in his will, the executors were properly required to account for it as a part of the income of the estate. By the rule prevailing in England, and which has been followed by the adjudications made upon the same subject in the State of Massachusetts, dividends made by the way of issuing additional shares of stock are considered simply as augmentations of the capital of the company, and for that reason forming no part of the income of the estate receiving such stock, as between the life tenant and the remainderman, while dividends in money of an equal amount would be regarded as part of the income of the estate. But in this and other States a different view of the effect of such a transaction has been adopted. When the stock is created as this was, wholly by the surplus earnings of the company, it is considered practically the same in its effect as the payment of the money itself, and then it has restoration to the company as a consideration for the issuing of this stock. In that view the stock becomes a simple equivalent of the surplus earnings of the company, liable to be appropriately disposed of as a dividend upon its capital. * * The weight of authority appears therefore to be decidedly with the determination made by the surrogate upon this subject, and that is to regard stock dividends, made in the manner in which these were declared, as simply

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another mode for the distribution of the surplus earnings of the company among its stockholders instead of actually paying the money to them."

In *Van Doren v. Olden* the chancellor sent the case to the master to inquire and report how much of the stock dividend was capital and how much was income. He was further directed to ascertain how much of the stock dividend was made of earnings which had accumulated at the time of investment of the fund in the capital stock, and how much of it came from earnings subsequently made.

And in *Cragg v. Riggs*, 5 Redf. 82, the surrogate declared that the New York and New Jersey authorities established among other propositions, that the question between life tenant and remainderman as to the right to stock dividends is dependent upon "how much of the stock dividend was made up of accumulations before and how much from earnings after the investment." The surrogate expressly declared his approval of this rule at the conclusion of his opinion. "But it is my duty to say that if there was any thing in this case to warrant the conclusion that any of the dividends so declared, whether in cash or stock, included income earned before the death of the testator, and before the right of the life tenant attached, I should deem it my duty to send the matter to a referee to take an account in respect thereto." But the Supreme Court at General Term on appeal from the decision of the surrogate, declared that it could not have produced any change in the result, even though it had appeared that any "assignable proportion" of the stock dividend had been derived from earnings of the company before the death of the testator, and before the rights of the life tenant in the original stock had accrued. (See the opinion of the Supreme Court above.)

In *Bates v. McKinley*, 31 Barb. 280, it was held that a cash dividend earned before the testator's death, but declared afterward, belongs to the life tenant.

In the English courts, it was formerly held that all extraordinary dividends belonged to the remainderman, even though divided solely from income and payable in cash. *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Ves. 185; *Witte v. Steere*, 15 Ves. 863.

In *Barclay v. Wainwright*, 14 Ves. 66, Lord ELDON decided that an extraordinary dividend belonged to the life tenant.

In *Price v. Anderson*, 15 Sim. 473, an extra dividend on insurance stock was adjudged to belong to the life tenant. To same effect *Johnson v. Johnson*, 5 L. & Eq. Rep. 164, where an extra dividend of £10 per share was held to be the property of the beneficiary for life. To same effect *Bates v. McKinley*, 31 Beav. 280. See also on this point the following authorities, which fully sustain it: *Murray v. Glasse*, 17 Jur. 816; *Hooper v. Rossiter*, 1 McClel. 527; *Norris v. Harrison*, 2 Mad. 479; *Plumb v. Neild*, 6 Jur. (N. S.) 529. But those courts have uniformly decided that a stock dividend, no matter what its source is, no matter though it represents the usual earnings and profits of the company, and would, if declared to be payable in cash, belong to the life tenant, shall go to the remainderman, even though the life tenant is thereby deprived of all benefit from the stock during the existence of his interest therein. This was expressly held in the *Matter of Barton's Trust*, L. R., 8

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Eq. Cas. 238, and *Hooper v. Rossiter*, 1 McClel. 527. In the first case Vice Chancellor WOOD says: "The dividend to which the tenant is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account, and turn it into capital account, it is competent for them to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain. * * * If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he must use his influence to get them to vote as he wishes. I think that is the true principle."

The Massachusetts Supreme Court not only adopted this principle, but went even further in its opinion. It stated the broad rule that the law "regards cash dividends however large as income and stock dividends however made as capital." This however was a mere dictum, and cannot be considered to have been the deliberate authoritative opinion of the court. This is clearly indicated by the subsequent decisions of the same tribunal in the case of *Leland v. Hayden*, 102 Mass. 550. In that case it appears that the company had invested its surplus earnings in its own stock and subsequently declared a dividend of such stock. The life tenant was adjudged to be entitled to it absolutely. The English doctrine was followed in the case of *Daland v. Williams*, 101 Mass. 571. The dividend in that case was payable in stock or cash at the option of the stockholder. The trustee, with the consent of all parties, elected to take stock. *Held*, that the stock went to the remainderman, and that the life tenant had only a life interest in it.

The English rule has been adopted also by the Rhode Island Supreme Court. *Petition of Brown*, 14 R. I. 371; s. c., 51 Am. Rep. 397; see also *Daland v. Williams*, 101 Mass. 571; *Heard v. Eldredge*, 109 Mass. 258; *Gifford v. Thompson*, 115 Mass. 478.

On the other hand the Supreme Court of Pennsylvania has favored the life tenant. In *Karp's Appeal*, 28 Penn. St. 368, the testator bequeathed 541 shares of stock in a corporation to one for life with remainder to another. At his death they were worth \$125 per share or \$67,500. In 1854, the shares having constantly increased in value the company called in the old certificates and issued in their place certificates for 1350 shares of the value of \$80 a share, or \$108,000. The question presented was whether this increase of \$40,500 belonged to the life tenant or must go to the remainderman. It nowhere appears in the case whether this increase in the value of the stock was owing in whole or in part to an increase in the value of the property of the company or whether any, and how much if any of it was attributable to surplus earnings and profits. It is clear that to the extent that the increase in value was owing to the natural rise in value of the property of the company, irrespective of accumulated profits, the life had no claim in equity or in law to the enhanced value of the shares. No one would have the folly to assert that the life tenant of real estate is entitled to the increased value of the property over and above its value at the time his interest in the property vests in him. Has he any greater right because the evidence of his and the remainderman's interest in that property is a stock certificate? Clearly not.

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Moreover this rule is very unjust because it discriminates unfairly against the remainderman and in favor of the life tenant. The remainderman must take all the chances of a loss from depreciation, and yet he can never reap any benefit from an increase in value. In spite of all these unanswerable arguments against giving all this increase of \$40,500 to the life tenant, the court so decreed, LEWIS, C. J., saying on behalf of the court: "It is equally clear that the profits arising since the death of the testator are 'income' within the meaning of the will, and should be distributed among the appellants (tenants for life). The profits amounted at the time of the issue of the new certificates of stock to the sum of \$40,500, exclusive of the current semi-annual dividends which have been previously declared and paid. That sum is the rightful property of the appellants. The managers might withhold the distribution of it for a time, for reasons beneficial to the parties entitled. But they could not by any form of procedure whatever deprive the owners of it, and give it to others not entitled. The omission to accumulate it semi-annually as it accumulated makes no change in its ownership." (This assumes that the increased value in the stock was owing wholly to surplus profits undistributed.) "The distribution of it among the stockholders in the form of new certificates has no effect whatever upon the equitable right to it." If all the value of the stock above its original par value was caused solely by accumulated profits, then all above the par value of \$50 a share should have been paid to the life tenant, because dividends cannot be apportioned, and the life tenant is entitled to the profits which have already accrued at the time his interest commences when a dividend including them is afterward declared, as much as he is entitled to subsequently accruing profits. This has been shown to be the law. The following cases fully sustain the doctrine. *Jermain v. L. S. & M. S. Ry. Co.*, 91 N. Y. 483-494; *Boardman v. L. S. & M. S. Ry. Co.*, 84 N. Y. 157; *Manning v. Quicksilver Mining Co.*, 24 Hun, 361; *Clapp v. Astor*, 2 Edw. Ch. 384. In *Willbank's Appeal*, 64 Penn. St. 256; s. c., 3 Am. Rep. 585, the court substantially reaffirmed its decision in the former case.

Mr. GUY C. H. CORLISS says in 33 Albany Law Journal, 427: "The true doctrines on this subject, if principle is to be the guide, are the following:

"1. If the dividend is made up of profits, the dividend goes to the life tenant irrespective of the form in which it is declared.

"2. The life tenant is entitled to all dividends whether in cash or in stock declared during the existence of his interest, whether they consist of profits which have accrued subsequently to the vesting of the life estate, or in part of earnings of the corporation which had accumulated at the time of the devolution upon the life tenant of his interest in the property.

"3. That in so far as any dividend consists of money derived from an increase in the value of the corporate property, or is derived from any source other than the net earnings of the company, the life tenant can claim no interest therein.

"4. That not only is it beyond the power of the corporation to bind the life tenant by dividing net earnings in the form of capital stock, but the life tenant can always show the true nature and source of the dividend in spite of any act or declaration to the contrary; and that on the other hand the

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remainderman may prove that a dividend which apparently belongs to the life tenant is in fact the property of the remainderman. To illustrate, suppose the company declares what purports to be a dividend of its net profits, but which in fact is a dividend of money realized from the sale of some of its corporate property. The remainderman may show the source of the dividend; otherwise the corporation might seriously impair the value of his interest in remainder by reducing the amount of corporate property. The principle underlying all these doctrines may be summed up in the statement that the life tenant is to have all the profits which are released from corporate control, and distributed among stockholders during the existence of his estate in whatever form the distribution is made; and that he shall have no more."

See "The rule in *Minot's* case," 83 Alb. L. J. 106.

 SPENCER V. BALTIMORE AND OHIO RAILROAD COMPANY.

(4 Mackey, 128.)

Negligence — contributory — priority to defendant's.

The plaintiff in going to his business found a train of cars of the defendant across the street. Having waited some twenty minutes, and the train not moving, he endeavored to cross the track by climbing between the cars, when the train was started without warning or notice, and he was injured. *Held*, that his conduct did not prevent his recovery of damages. (*See note, p. 272.*)

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

Irving Williamson and Campbell Carrington, for plaintiff.

R. T. Merrick and Geo. E. Hamilton, for defendant.

JAMES, J. It appears that the plaintiff was on the street early in the morning, during the month of September, and found lying in his path a long train of cars. After waiting a length of time for the train to move out of his way, and being impatient to reach his business, he attempted to climb over the obstruction by passing between two cars; just at that moment the train was started, without the warning having been given by the sound of a bell or whistle, and his foot was crushed. The suit is based upon the alleged negligence of the defendant, to which the plaintiff claims not to have contributed.

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At the conclusion of the trial, the defendant offered ten prayers, which were all rejected, and thereupon the court substituted two instructions, one of which is as follows :

“ If the jury believe from the evidence that the plaintiff attempted to cross the track between two of the freight cars while the train was at rest, and that while making such attempt the train was put in motion and the plaintiff was thereby injured, and shall further believe that the plaintiff was guilty of a want of ordinary care and prudence in attempting to pass between the cars while they were at rest, under the circumstances, yet if the jury shall also find that if the defendant's agents, in starting and moving the said train at the time of the injury, had used ordinary prudence and care in giving reasonable and usual signals or notice before putting the train in motion, and in keeping a reasonable lookout, the injury would not have occurred, then the plaintiff's want of care and prudence in attempting to cross between the cars (if the jury shall find the same proved,) would not in law exonerate the defendant from responsibility in this action.”

It will be perceived that this instruction is applied to a case where the negligent act of the defendant and that of the plaintiff were concurrent in point of time. The same rule has been applied to similar circumstances by the Supreme Court of Missouri, and it was adhered to in a line of cases in that court. But an examination of the cases will show that the rule as declared in the Missouri decisions is not at all sustained by the general line of authorities.

Negligence consists in omitting what it was the duty of the party to do under the circumstances. For example, in the case of *Davies v. Mann*, 10 M. & W. 548, where a person had tied a donkey so that it stood in the road, and afterward the driver of the wagon drove carelessly along the same road so that he killed the donkey, the carelessness and negligence of the person who tied him there in the road was held not to be contributory. The negligent act of the owner of the animal was prior in time to that of the driver of the wagon. The latter saw in the road this animal, and though it had been negligently left there, he had no right, either willfully or negligently, to drive over it. The negligence of the plaintiff in the case did not, in contemplation of law, contribute to the injury. It was what was called remote. But the reasoning of the case is, that the driver of the wagon had before him a case which called for a certain degree of care, and he should have acted with reference to the fact

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that the donkey was standing there. It was therefore negligence in him to drive as he did, in view of the circumstance.

There is a line of cases sustaining this principle, and on the other hand, cases where the acts occur at the same time, so that the defendant has not a case before him in which he has to act with reference to the existence of negligence on the other side. In such a case the negligence of the plaintiff is contributory. Both are the effective cause of the injury that happened.

We find this rule very well stated in the case of *Trow v. Vermont Cent. R. Co.*, 24 Vt. 494, which I cite, not on account of its special authority because it is one of a numerous line of cases, but because it states the principle so clearly. Having cited some authorities, the court says :

“ This leads our investigation to the question whether an action can be sustained when the negligence of the plaintiff and the defendant has mutually co-operated, in producing the injury for which the action is brought. On this question the following rules will be found established by the authorities. When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words ‘ proximate cause ’ is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason ‘ that as there can be no apportionment of damages, there can be no recovery. ’ So where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained for the reason that the immediate cause was the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These principles are sustained by *Hill v. Warren*, 2 Stark. 377; 7 Metc. 274; 12 Metc. 415; 5 Hill, 282; 6 Hill, 592; *Williams v. Holland*, 6 C. & P. 23. On the other hand when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then be well sustained, although the plaintiff is not entirely without fault. This seems to be now well settled in England and in this country. Therefore if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie

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for the injury. So in this case if the plaintiff were guilty of negligence or even of positive wrong, in placing his horse in the road, the defendants were bound to the reasonable exercise of care and diligence in the use of their road and management of the engine and train, and if for the want of that care the injury arose, they are liable. Such is the case of *Davies v. Mann*, 10 M. & W. 548 where one unlawfully left his fettered donkey in the highway, and it was killed by the negligence and carelessness of the defendant in the management of his horses and wagon, Lord ABINGER held, 'that he might recover, though the animal was improperly there.' "

The principle then is, that the situation presents to the defendant an occasion for a certain degree of care measured by the circumstances, one of which is that he sees that there is a person or an animal in danger, no matter whether they are there by carelessness or not, and it is his business to exercise care with reference to that situation. In such a case the fault of the plaintiff is held not to be contributory. The injury is the result of the carelessness of the defendant.

When however the two circumstances occur at the same time, the defendant is not charged with the duty of taking care of the plaintiff, inasmuch as the sudden occurrence of the plaintiff's act gives him no opportunity to do so. The two acts of negligence being concurrent, each is held to contribute to the result.

Applying this rule to the facts of this case, we find a person engaged in the very act of crossing this train — climbing over between the buffers — at the moment when this defendant carelessly started the train without notice.

For these reasons and upon these principles, we feel compelled to send the case back for a new trial. There was error in this instruction.

Sent back for a new trial.

NOTE BY THE REPORTER.— This case is contrary to *Lewis v. Balt. & Ohio R. Co.*, 88 Md. 588; a. c., 17 Am. Rep. 521.

In *Ostertag v. Pac. R. Co.*, 64 Mo. 421, a boy sitting on a trestle work under a freight car, at the depot, was run over by the starting of the train. *Held*, that there could be no recovery. It was not clear whether a locomotive was attached when the boy took his position, and it appeared that boys were in the habit of going under the cars to pick up what dropped from them. The question was left to the jury.

In *Cent. R., etc., Co. v. Dixon*, 42 Ga. 827, the defendant attempted to pass under the cars while they were stopped for wood and water, after dark, not at a public crossing. *Held*, that he could not recover. The court said: "It

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was in fact a most imprudent and rash act." "The attempt to crawl under the cars showed a want of ordinary care." The omission to blow the whistle "does not however excuse the rashness of the plaintiff in putting himself under the wheels of the cars, which he had every reason to expect would move almost immediately, since according to the habit of the cars the stoppage of the cars was but for a very brief period."

In *Chicago, Burlington & Quincy R. Co. v. Dewey*, 26 Ill. 255, the deceased in the night tried to go between cars of a freight train standing at the station between the station and a passenger train which he wished to take. The court said: "The deceased knew that an engine was attached, with steam up, liable to move at any moment. It was in the night when the engineer or conductor would not be likely to see or know of his effort to pass between the cars. He gave no notice of his intention to pass through, and these officers had the right to suppose a prudent or reasonable person would not attempt to pass at the time and under the circumstances." "There can hardly be a doubt that any reasonably prudent and careful person would have gone around the train, or would have waited until it passed." Judgment for plaintiff reversed. [In the principal case the party could have gone around the square.]

This was followed in *Chic., etc., Ry. Co. v. Coss*, 78 Ill. 894, where the facts were precisely similar, except that it does not appear that the accident was in the night. The court said: "It was no doubt the duty of the company, in due time before the passenger train left, to clear the way, so that appellee and all other passengers could approach and enter it with safety. But a failure of the company to perform their duty did not license appellee to hazard his life to reach the train. Had the passenger train left before he could approach it safely, and thus the company violated its implied agreement to carry him on that train, if he had procured a ticket for passage thereon, he would have had his action against the road, for all damages sustained by not carrying him on that train, but it conferred on him no right to imperil his life or limb." Judgment for plaintiff reversed.

In *Stillson v. Hannibal, etc., R. Co.*, 67 Mo. 671, the train lay across the street, with an opening a few inches wide between the rear car and the rear car of another train on the same track, several feet from the street line. One train backed while the party was trying to pass through the opening. The court said that as "the injury did not occur at any street crossing, but on a part of the track where there was not even a private or occasional pathway, the defendant had a right to presume that no one would attempt to cross. It was true the street crossing was entirely obstructed by the train, which obstruction the municipal authorities might at any time have prohibited, and for which the defendant might have been held liable in damages for any inconvenience occasioned by such obstruction, but this obstruction did not authorize one who was about to cross to attempt to do so at any accidental opening between the cars, either of that train or of the adjoining one, except at the peril of the person so attempting to cross." Judgment for plaintiff reversed.

In *Memphis, etc., R. Co. v. Copeland*, 61 Ala. 376, the deceased got off a passenger train just arrived, and tried to crawl between cars of a freight train standing between him and the depot, with engine attached with steam up.

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The court said: "The attempt thus to pass between the cars of a train which he must have known was liable to be moved cannot be classed as less than negligence. It borders on recklessness. * * * Both were in fault." The *Stillson* case cited. Judgment for plaintiff reversed.

In *Baltimore & Ohio R. Co. v. Fitzpatrick*, 35 Md. 32, the company had left an opening between the cars at the street crossing, but the party undertook to go through another opening in the train, on the street beyond the crossing, opposite his father's door. This was held a proper case for the jury.

In *McMahon v. North Cent. Ry. Co.*, 39 Md. 438, the party attempted to pass between or under the cars, just before or just after they started. But a new trial was granted on another consideration.

In *O'Mara v. Del. & H. Can. Co.*, 18 Hun. 192, the circumstances were precisely similar to those of the principal case, and a recovery was denied. The *Lewis* case was cited. The court said, "The plaintiff could have gone around the end of this obstructing train with safety, a distance of one hundred to two hundred feet. But he preferred to climb across defendant's cars, knowing it was a train liable to be moved, that the engine was near the depot but not in sight, and that cars were frequently in motion at that point. Under such a state of facts, the plaintiff was very negligent in taking the risk, and as his injury was caused thereby he cannot recover."

In *Vicksburg, etc., R. Co. v. Alexander*, 62 Miss. 496, a locomotive and train stood projecting three and a half feet into the highway crossing. A physician, with a horse and buggy, on his way to visit a patient, after waiting twenty minutes, tried to cross and was injured by the starting of the train. *Held*, a question for the jury. "There was room for a horse and buggy to pass in front of the train. All were thus invited to cross. * * * The result showed he was mistaken, but his course was a most natural one under the circumstances."

In *Ranch v. Lloyd*, 31 Penn. St. 358, an infant, six or seven years old, attempted to crawl under a freight car obstructing the crossing. The court held that he was not necessarily negligent. But the court said, if he "had been an adult, he would have had no right of action. * * * Common prudence would have restrained him."

Shearman & Redfield say (Neg., § 490) that this is "a difficult question." In regard to waiting for the train to move and suing for damages for the delay, they observe: "Such suggestions are surely fine examples of judicial humor. After two or three years' litigation, the plaintiff might probably recover damages to the amount of twenty-five cents." "It is not (in Pennsylvania) deemed negligence for the plaintiff to cross by the only path left open to him." Citing *Ranch v. Lloyd, supra*, which does not so hold. "This we consider the proper rule. We do not believe that the most learned judge would fail to step over the platform of a car under such circumstances; and it is absurd to call that course negligent which every sensible man would adopt. But it is unquestionably negligence of a gross degree to pass *under* cars." (And yet that was what was attempted in *Ranch v. Lloyd*.)

We consider the principal case clearly wrong and against the great preponderance of authority.

DISTRICT OF COLUMBIA V. OYSTER.

(4 Mackey, 235.)

Statute — "produce dealer."

A license law provided that "every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts shall be regarded as a produce dealer," and that "no additional license shall be required from produce dealers for selling meat." *Held*, that butter and eggs are "produce" within the statute, but one who sells meats alone is not a produce dealer. (*See note, p. 278.*)

INFORMATION for selling without a license. The opinion states the case.

A. G. Riddle, for plaintiff.

William A. Cook & Leigh Robinson, for defendants.

MERRICK, J. The cases against Oyster and Daly were cases where the information had been filed against the party as a produce dealer, the charge being that he was engaged in the sale of butter and eggs, and the question was raised whether butter and eggs constitute "produce" within the meaning of the law.

There is very little to be said with reference to that matter except to refer to what has been understood to be the common usage and practice of society and the sense in which the word "produce" has been used. The argument at the bar was, as against the information, that produce meant only those things which were the product directly of the soil, such as cereals and fruits, as distinguished from those things which were the product of human industry, and not derived from, but directly connected with, the product of the soil.

But the common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the *situs* of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contra-distinguished from manufacturing or other industrial pursuits.

The product of the dairy or the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected

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with the soil and with those who are engaged in the culture of the soil. It is, in every sense of the word, a part of the farm product. It is depended upon and looked upon as one of the results and one of the means of income of the farm, and in a just sense, therefore, it may be considered produce.

The word "produce" has no definite, exact and technical meaning. It may be used in a larger or more restricted sense. But we must look to what the habits and usages of society are, and what has been the practice with regard to it, so as to give an interpretation to this word which is not a technical one under the law. And in that aspect of it the court is at no difficulty in determining that in their judgment the words "produce dealer" as used in the license law of the District of Columbia, which says that "produce dealers shall pay \$25 annually, and every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts, shall be regarded as a produce dealer," apply to one who brings eggs and butter to vend in the market as much as to one who brings only cereals or fruits or what is ordinarily called "garden stuff."

We therefore shall remand the cases against Oyster and Daly to the police court in order that they may be proceeded with to judgment.

The case against Emmert is an information against a party for selling bacon, hams, dried meat and other meats of that sort, which are not the meat of animals slaughtered just before being sold, but are cured meats, and the question there is whether the party is liable to a license as a produce dealer.

While the clause in the law says that "Produce dealers shall pay annually \$25, and every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts shall be regarded as a produce dealer," it also contains this qualification, "that no additional license shall be required from produce dealers for selling meat."

That seems simply to indicate, not that the selling of meat is characteristic of a produce dealer, but that the produce dealer who gets his license as such, has the further privilege, or a sort of grace and favor extended to him, within the limited amount mentioned in the statute, because it says that he shall pay no additional license where the capital invested is less than \$1,000, showing that the idea was to make the produce dealer a privileged character to the extent of his small dealings, that he might supply the necessities of society

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in having at his stall not only the product of the garden and the product of the stream, as fish and fruits, but that he might also sell a limited quantity of bacon and the like, with dried beef and other things which go to make up the complement of a produce dealer's establishment, without thereby depriving himself of the character and privileges of a produce dealer.

The word meat as used in connection with the butcher's employment, is used in its very largest sense and without any restriction as to the quantity which he is privileged to sell.

The authorities do not use, in the licenses for butchers, or in the regulations about butchers, the same term as was used in the statute of the United States, "butchers' meats," which would exclude the dried meats from the occupation of the butcher, but they say that the butcher and every person whose business it is to sell meats from market stalls shall be regarded as a butcher. There they have defined a butcher in particular language. Any meat sold at a market stall comes within the function of a butcher and belongs to his office, and his right to sell shall be determined by the right of the butcher to sell meats.

So far as the license of the butcher is concerned, the law goes on to provide that he shall pay certain definite sums in the western market, the eastern market, in the Georgetown market and in the northern market, for the occupation of his stall, but it is to be paid not as a license, but as a rent for the use and occupation of that stall. A butcher pays no license as license. He pays part of the revenues of the city as a rental for the occupation of a portion of the ground belonging to the city in these several market-houses.

So far as the central market is concerned, there is no provision in the statute requiring him to pay any rental. That seems to be provided for by the regulations of the market itself and in the obligation of the market company to pay a certain annual stipend to the District of Columbia. The particular corporation, holding that market is entitled to the rentals of that market, as the city owning these other markets enumerated is entitled to the rentals of the stalls of those markets. It is only in the character of rentals, and not in the character of licenses that the butcher makes any payment at all.

Finding then that the traverser Emmert deals, according to the information, only in meats, and dealing in meats of any sort, whether fresh or cured meats, being defined to be the thing that

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characterizes the trade of a butcher as declared in the 15th paragraph of the statute, the court is constrained to say that he does not come within the characteristics of a produce dealer who has to have a license, and as there is no specific license assigned to a butcher in the central market, he must go acquit of this information.

NOTE BY THE REPORTER.—In *Mayor v. Davis*, 6 W. & S. 279, the court said: “Swine, horses, neat cattle, sheep, manure, cordwood, hay, and many other things not more savory, would be out of place in a market-house for the sale of poultry, vegetables, fruit, eggs, milk, butter, lard, and other provisions for the mouth; yet they are strictly produce of the farm; much more so indeed than beef, which though it comes like everything else primitively from the soil, is as much a manufactured article as leather, cloth or charcoal. The ox is the produce of the farm; beef is the produce of the slaughter-house and the shambles. It is manufactured by the professional skill of the artisan, whose business is as distinct from that of a farmer as is that of a flax-dresser or a wool-comber. That the farmer sometimes works up his own raw materials, cannot prevent it from taking a new denomination from the additional labor expended on it. The versatility so conspicuous in the American people often makes him his own weaver: yet it follows not that his linsey-woolsey, though cut from his own sheep, is the less manufactured, or the less improperly denominated the produce of his farm. The blending of trades does not change the nature of the wares. When the farmer slaughters his own ox, the beef is not less the product of the slaughter-house.” And it was held that beef is not the “produce of a farm.”

In *State v. Borroum*, 23 Miss. 477, the court took judicial notice that cotton is a “product or commodity.”

KOONES V. DISTRICT OF COLUMBIA.

(4 Mackey, 339.)

Payment — of taxes — check not paid.

A tax payer gave his check for his taxes to the collector. It was not presented for several days, and meantime the bank failed. The bank was insolvent when the check was drawn, and it was not shown that the check would have been paid if promptly presented. *Held*, that the check was not payment.*

THE opinion states the case. The defendant had judgment below.

* See *Flinn v. Sleet*, post.

Kooner v. District of Columbia.

E. A. Newman and *A. A. Binney*, for plaintiff.

A. G. Riddle, for defendants.

MERRICK, J. The court has considered the facts in this case; and thinks it is apparent that the complainant is not entitled to any relief whatsoever at the hands of a court of equity or of any other court as against the District of Columbia.

He claims that on a certain day he paid the taxes which were due by him to the District of Columbia in a check for four hundred and ninety odd dollars on the bank of Middleton & Co. of this city, which bank was open at the time the check was drawn and remained open the next day. The third day however it suspended, and the collector not having presented the check there on the day of its receipt or the day after, it is claimed therefore that the complainant is to be credited with the amount by reason of the default of the collector in not presenting the check in due season, according to the mercantile law, for payment at that bank.

There is no question in this case, as to the law touching commercial paper, or the obligation of a holder to present a check within a reasonable period, twenty-four hours if in the same town; and if he does not present it in that time, and the bank thereafter fails, the drawer of the check would be entitled to be discharged, because that check has been a payment as between the original parties to the check.

But the question in this case, as I may say, is not a question of commercial law; it is a question of agency. Was the collector of taxes authorized by the law of the land, or by any properly delegated authority from the municipal officers superior to him, to accept in payment of taxes any thing else than money?

The doctrine which expands an agency by reason of the acts and dealings of the parties from time to time has no application whatsoever to the official acts of a public officer. Everybody knows by the public law of the land (or is charged with knowledge of) the extent of the power of that officer, and his superior officers, so to speak, cannot qualify it except so far as the law has delegated to them a power to control, or modify, or expand his legal obligations. Hence, there can be no such thing as a presumption of agency growing out of the dealings of a public officer in respect to his public duty; because whatever presumption, as between private parties,

might arise in favor of a delegated authority from an outward act of dealing, so far as the public officer is concerned that presumption is repelled by the known law of the land, the knowledge of which is imputed to every citizen, which known law of the land limits, defines and bounds his power, and qualifies and corrects any presumption of agency which might otherwise arise out of these acts and dealings.

That being the case, what is the effect of a payment by a check ordinarily? It is but in itself a conditional payment, to be ripened into an actual payment, provided the check be honored by the bank. But the probability that that conditional payment may be ripened into an actual payment, does not advance a single step toward the establishment of a right of a public officer in the character of agent of the public to surcharge the public with an additional risk in respect to the collection of its public dues.

The law says that the collector shall collect the taxes. The law further, to secure the taxes, and in addition to the personal responsibility, makes the taxes a lien upon the real estate, the visible estate of the party in question. Now can it be said that a practice, no matter how long indulged in by the collector for the convenience of parties, of receiving from tax payers checks upon their bankers can be considered to supersede, to dispense and put aside at his pleasure the lien of absolute security which the public has for the collection of its taxes by his hold upon the property of the party? That would extend the law of agency beyond anything that has any foundation in well-established precedents or authority in the books, because the books say that by the taking of a check you superadd to the original predicament of uncertainty of payment as between the debtor and creditor, the uncertainty of payment arising out of the possible insolvency of the drawee of the check, and the obligations of diligence on the part of the holder to present that check within due season in order to preserve his demand against the original holder.

That being the law of agency, so far as agents are concerned and the law modifying the payment of agents, can it be said that a public collector, without any warrant of law whatsoever, who is dealing for the convenience of the parties, is authorized to put his personal judgment, his personal inclination to promote the convenience of and to accommodate the tax payer in lieu of the legal lien, and thus, for those imperfect and almost frivolous considerations, so to

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ask, to waive the certainty of the right of collection and the security that the public has for its taxes?

But in this particular case, even if you were to assume that there was the semblance of a recognized practice ripening into law to pay by check, that surely would only be a recognized usage to pay by checks upon authoritative and well-established banks. The word "check" has a signification, a sort of cabalistic meaning, in the mind of the public, because it represents ordinarily, and the meaning of the term implies, that it is a draft by a holder or depositor upon a well-accredited and established bank which stands almost in the place of an actual bank note from the bank itself. And it is because of that character that the commercial law has attached to it the consequences which follow by reason of the presumption of a payment when it passes from man to man in their private transactions.

But can it be said that the recognition of such a usage, such a qualified mode of payment with regard to a check thus designated and characterized, and which is the true meaning of it, can be expanded into the recognition of an agency on the part of the collector to take a private order from any individual against another individual, or any of these brokers who are about in the town here, who assume to themselves, for the purposes of their own trade, the formal, the solemn, the imposing epithet of bankers? They are not bankers in any sense of the term. They do not come within the proper designation of bankers, and a check upon these so-called bankers, if you would translate it into the common English, and say that the man has given to the collector an order upon some private broker down in town here, some private individual, you would at once see that this did not come at all within his power and authority as a designated agent, so as to relieve the drawer of that check of his obligation and throw the burden upon the District of Columbia for non-payment upon the presumption of the agency.

That was the character of this check — an order given on the supposed or so-called banking house of Middleton & Co., who were utterly insolvent at the time it was granted, and who made an assignment the day after. Under circumstances of this sort it would be of the saddest consequence, it would be subversive of the whole security of the public for a court of justice to entertain for a moment the idea that checks of that description could be considered as payment of taxes, the citizen be subserved, and the public thrown

into the necessity of making up for the want of credit of the parties upon whom such drafts are drawn.

There was a case somewhat similar to this in its general features decided in England in the year 1839, which was the case of *Bridges v. Garrett*, reported in the L. Rep., 5 Com. Pleas, 451, which was the case where the steward of a lord had received the sum of seventy-eight pounds and odd shillings in payment of a fine for the renewal of certain copyholds. The check was drawn upon a banker and was a cross check as they call it in England, and that check was put to his credit in the bank, it was actually paid and went to the credit of the agent who was entitled to receive the money, and afterward the fund was stopped by the bank, it having been mingled with his common account, for the purpose of making up a deficiency in that account as between him and the bank. The question there was whether the payment of that check under such circumstances was a valid payment. The court below refused to admit it as a payment even under such circumstances, but the court above said that the check having been, in point of fact, paid as a check, and then deposited by the agent in his own bank, he had, therefore, received it, and being authorized to receive the amount of the fine, and the check having been actually paid, it thereby became a payment, and his depositing it in his bank, and its subsequent conversion by his banker to his own private account, would not deprive it of the character of a payment when it was honored at the bank upon which it was drawn as between the debtor and the creditor.

And that is the whole scope of this case, and of the whole line of cases. I have not seen a case anywhere reported in which it was held that payment by a check which was afterward dishonored could be considered a payment, in any sense of the law, unless the party who received it had been specially authorized to receive it, or by the course of trade was to be presumed to have been authorized to receive it, and thus to assume for the creditor the additional burden of the risk of want of diligence in the presentation of the same.

But it is utterly inadmissible in the case of public officers to add to the trouble and burdens of the public for the purpose of saving an individual who has paid by check exclusively for the gratification of his own private convenience. Having done it for his own convenience he must take the consequences of having made the collector of taxes his own agent, and not say that in that respect he was the agent of the public.

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Under these circumstances the decree of the court below will be affirmed with costs.

Affirmed with costs.

Cox, J. I agree in the conclusion announced in this case, but I have some doubts about it and therefore do not wish to be committed to the general proposition that would exclude from a case of this kind the general rules about commercial paper.

It is conceded as between individuals, if a man gives a check in payment of a debt on a solvent bank which would be honored on presentation, and the money is lost through the failure of the creditor to apply for the money until the bank has become insolvent, that the creditor makes the check his own, and his debt is considered paid.

I doubt whether a different rule applies where a check is tendered and received in payment of public dues. It would rather seem to me that under the circumstances presented in this case, it would be substantially the same as if the creditor had had the check passed to his credit, and had lost it afterward by allowing it negligently to remain in the bank until it had become insolvent.

But however that may be, it is demonstrated in this case that at the time the check was given the so-called bank was absolutely insolvent. By the testimony of the bankers themselves it appears that the assets at the time did not amount to one-tenth of the liabilities of the bank. The burden of proof of course is upon the complainant in a case like this to show that his check was good, and that the loss was caused by the neglect of the other party.

The proof in the case utterly fails to satisfy us that this check would have been paid if it had been immediately presented. The testimony of one of the bankers is that the check would have been paid if presented, as another check for \$71 had been paid the same day. We think that is totally unreliable. It appears that after the assignment, which was made the next day, when the receiver took possession of the bank there was not more than forty or fifty dollars in the bank in cash. The banker testifies that on the twenty-ninth there were several thousand dollars in bank. Whether it was there five minutes after the time the bank opened and was available for the payment of this check or not is not shown. The books have not been produced to show what amount of money there was. The burden of proof is on the plaintiff, and he has certainly failed to satisfy us that the check was worth a cent.

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(4 Mackey, 306.)

Telegraph — poles in street — nuisance.

Telegraph poles and wires in a public street are not necessarily a nuisance which will be prohibited at the suit of one in front of whose lot they are erected. (*See note, p. 290.*)

BILL for injunction. The opinion states the case.

Wm. A. Cook, H. E. Davis, Warren C. Stone and Oscar Nanck,
for complainant.

J. Hubley Ashton, Nathaniel Wilson and A. G. Riddle. for
defendant.

MERRICK, J. [Omitting other questions.] The question however remains: Was there in the exercise of this right, or in the proposed exercise of this right, any private nuisance contemplated which should be restrained by the interposition of a court; because it must be conceded that while there may be a grant of authority on the part of the Federal government to use its property, or the grant on the part of any public authority to use the public property, it must be done always with due regard to the rights of private citizens, and if the right of a private citizen be invaded it is to stand in just compensation before the tribunals of justice. No man's right is to be invaded, no matter by what authority or by what power; at the same time no man has a right to set up his caprices so as to prevent the just exercise of rights for the benefit of the public, whether by the public itself or by any private agency which the public chooses to adopt as the instrument for carrying out the purposes of the public welfare.

Before we consider the gravamen of the private grievances alleged on the part of the complainants here, it is well enough to see what the general rules of law are which regulate applications for redress of this sort on the part of any citizen who applies for injunctive relief to a Court of Chancery. We need not go outside of two leading decisions pronounced by the Supreme Court of the United States as to the measure of chancery power in this respect. There

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has been a great deal said and a great deal written with regard to the extent of injunctive relief, and a great deal of conflict and confusion in decisions in various places. But happily, as we have the most august tribunal in the world to lay down the rule of action for us, wherever they have spoken it is enough for us to recognize and be governed by what they have said, leaving nice distinctions and complicated rules elsewhere to adjust themselves as they best may under the administration of law not governed and controlled as we are by this one tribunal to which we can resort with so much confidence.

In *Mississippi & Mo. R. Co. v. Ward*, 2 Black, 485, the rule was laid down by the Supreme Court. That was an application to restrain the erection of a bridge, at Rock Island, over the Mississippi river. The court used this language, at page 494:

“In the next place: Is the bridge west of the Illinois boundary an unreasonable obstruction, and therefore a nuisance that a Court of Chancery can lawfully remove? In considering this question we must be governed by the same rule on which a court of law could proceed in case of an indictment against the bridge company for committing the nuisance, and the rule is that if the abridgment of the right of passage occasioned by the erection was for a public purpose, to produce a public benefit, and if the erection was in a reasonable situation, and a reasonable place was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable.

“Then again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant, and so if this case was referred to a jury to try the fact, and they doubted, they would be bound to acquit. And the same rule applies in a Court of Chancery where the court ascertains the fact of nuisance.”

This is in regard to a public nuisance where a private party seeks to restrain the injury to himself through an operation of a public nuisance.

In the same volume they also lay down the rule with reference to purely private nuisances, which have not any public aspect at all, and that is done in the case of *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black, 545. In a series of resolutions collated by the

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court, to be found at page 552, they say: "A diminution of the value of the premises without irreparable injury is no ground for interference. Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. The court will consider all the circumstances and exercise a careful discretion. This jurisdiction is applied only where the right is clearly established; where no adequate compensation can be made in damages, and where the delay itself would be a wrong. The case must be one of strong and imperious necessity, or the right must have been previously established at law. The right must be clear and its violation palpable."

If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld.

After the right has been established at law, a Court of Chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case."

Now, these are the rules with regard to injunctions that bind the administration of injunctive relief in this court. Apply them to the allegations and the facts in this cause. What are they? I have already shown that the case of the plaintiff acquired no additional force by reason of the allegation of a public nuisance, because the act having been by authority of law, the question of public nuisance is out of the case. Then, how do they stand with regard to the claim for a private nuisance? What are the pretenses which they set up?

In the first place, as I have said, one of the complainants owns a feed store, one owns a drug store, one owns a hotel, and two own stove stores, in a crowded thoroughfare, Seventh street north. Now, what are their allegations? They are to be found in the fourteenth paragraph of the amended bill. It is to be observed that they do not claim on account of their residence; they do not claim on account of private families; there is no allegation of that sort in the amended bill. They have stricken out the second paragraph of the original bill, and in the second paragraph of their amended bill, they simply aver themselves to be the owners and occupants of certain establishments and buildings in the city of Washington, describing them as applied to the uses which I have just designated.

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Then in this fourteenth paragraph, they lay down the gravamen of the injury of which they complain: "That the said poles, if erected, will seriously and materially interfere with the use of the said portion of the said street and the ordinary travel thereon, and will obstruct and impede the ordinary use and enjoyment by the complainants of their said several premises, and the said portion of the said street both as highway and for other purposes for which the same, as contiguous to the said several respective premises, is now properly and lawfully used by the complainants."

Is there any thing in that allegation? The poles, as it appears, are to be placed, according to the proof and the sworn answer, at the distance of 150 feet apart along the line of the curbstone and as near as may be upon the dividing line of lots and never in front of the entrance of any house or store along the line of the street. That is the sworn answer, that is the proof and that is the fact.

Now, with that fact staring us in the face, is it not too great an appeal to the credulity of any judicial tribunal to say that the erection of poles at intervals of 150 feet along the line of a street can make any substantial impediment to the entrance of any business place on such street? We have those things, as is matter of public notoriety, all over the city of Washington, all over the crowded cities of New York, Philadelphia, Boston, Baltimore, and the western cities. And we have not been shown any case in which it has ever been held that these telegraph companies have been restrained from the exercise of their business or the erection of their poles upon the ground that they impeded, in point of fact, the access to any business place within any of these cities. And it cannot, in the nature of things, be that they do. A space of twelve inches which is about the average width of the pole, or fifteen inches if you please, occupied at intervals of 150 feet, can be no practical impediment to the approach of any man's house along any street of the city.

The next allegation, which is part and parcel of the same, is that it will impede and interfere with the complainants, their families and their customers in business in access and approach to, and departure from the said tenements and premises. How can the entrance to a doorway be largely impeded by a pole twelve inches wide one hundred feet off? And they do not offer any proof, in point of fact, of any such impediment.

Then they say that the "wires proposed to be strung upon the said poles will, if so strung, be liable to be blown down and fall

upon the said portion of the said street, to the great peril of the complainants, and during the high winds, which prevail in the said city, will create a great and loud hissing and singing noise, to the disturbance of the sleep and quiet of the complainants residing in their vicinity."

That is a prospective and imaginary difficulty, and it may be dealt with sufficiently by quoting the language of the Court of Appeals of the State of Missouri in the case of *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 491:

"The fears expressed by plaintiff's witnesses that the vibrations of the pole may cause the area wall (which prevented the water in a sewer from getting into the plaintiff's cellar), to crack, thus letting water from the sewer into plaintiff's cellar; and that by reason of its great height, it may be blown down in some unprecedented storm, are mere conjectures, of problematical and contingent damage, which is not likely to arise, but which, should it arise, under such circumstances as would impute it to the negligence of defendant, would afford ground for redress in an action at law for damages."

The utterance of that enlightened court is quite a sufficient answer to problematic danger which these complainants allege here with a view to arrest a great work.

The complaint also alleges: "That the said wires will, if erected, seriously and materially increase the danger of destruction of the said tenements and buildings by fire, by their liability to attract lightning, and by their bringing into proximity to the said tenements and buildings the action of electricity; and that they will also seriously hinder, impede and obstruct the operations of the fire department of the said city in extinguishing any fire or fires that may occur in and upon the said tenements and buildings, and will interfere with access to and escape from the same in case of necessity on account of such fire or fires."

This completes the enumeration of the grievances that these parties complain of. The answer to it, besides being obvious to the common sense of every man, will be found, if there be need to refer to authority, in the case of *Rhodes v. Dunbar*, 57 Penn. St. 274, and in the case of *Mayor of Baltimore v. Radecke*, 49 Md. 228; s. c., 33 Am. Rep. 239. In this last case there was an application to restrain the erection and maintenance of a carpenter's shop which was run by a steam boiler in a crowded part of the city where as the parties alleged, there was a most imminent danger by reason of

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the combustible materials used there of setting fire to the adjacent property and by enhancing the insurable risks of property on account of this great danger; and that was the point of injunctive relief made by the parties. The Court of Appeals said that the complaint, that the business conducted was dangerous, and conducted with combustible materials brought into dangerous proximity to the fire of the boiler of the engine, subjecting their buildings to much hazard and their merchandise to increased danger from fire, raising the prices of insurance and exciting the fears of neighboring owners for the safety and security of their property, were imaginary dangers, and not at all, any one or all of them put together, the occasion for injunctive relief against a legitimate business prosecuted in a legitimate way.

This disposes of each and all of the objections urged in the fourteenth paragraph, so far as they affected the rights of these parties as the foundation for their claim to a Court of Chancery for injunctive relief. But assuming that there was some injury, still that injury would not of necessity, would not of itself, justify the application to a Court of Chancery for relief. As I have said, and as the authorities lay down the rule, the Court of Chancery will consider all the circumstances and equities of the case; and where as a consequence of its interference, the hardship upon one side would be immeasurably greater than the injuries sustained by the other, it will not interpose the extraordinary remedy of injunction, but will leave the complainant to his action at law. It seems to this court that it would be an extraordinary stretch of power to strike down a great commercial agency, to destroy one of the chief instrumentalities of intercommunication in this country, because peradventure lightning might be passing along a wire and strike the house of a party who lived near the line of the telegraph, or that it increased the amount of his insurance, or that it made some noise occasionally which excited the nerves of a restless sleeper so that he was made unduly watchful during the hours of the night.

These general views seem to dispose of all the important questions of law in the case, as also they dispose of the special equity set up by the complainants in the cause. In view of everything connected with the case this court is of opinion that there is no foundation whatsoever for the application which has been made for injunctive relief, and that the bill of the complainants ought to be dismissed with costs.

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NOTE BY THE REPORTER. — See *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; s. c., 47 Am. Rep. 453.

In an action to remove telegraph poles from a street, the erection being authorized by law, the only question for the jury was whether the poles were of a character to interfere with the public use of the street. *People v. Met. Tel. Co.* N. Y. Supreme Court Circuit, N. Y. Daily Reg. Mch. 19, 1883.

A similar ruling was made in *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485. The court said. "Some inconvenience may possibly flow from it; but the statute obviously does not mean to prohibit the erection of telegraph poles unless the inconvenience to the property owner is of such a material character as would constitute a nuisance in case the action were for a private instead of a public use. There are many things which work much more serious hurt to adjacent property than this, many callings which cannot be carried on in cities without more or less inconvenience or detriment to others; and yet they cannot be enjoined as nuisances, because their existence is necessary to trade, and they furnish the ordinary means by which people gain their livelihood. An iron foundry, a livery stable, or a match factory, erected in the immediate vicinity of this plaintiff's property, would cause far greater damage thereto than the erection of these two poles in the sidewalk, and yet we apprehend that the erection of such establishments would not be enjoined by the courts.

* * * It is claimed that the poles are a partial obstruction to the sidewalk; that the plaintiff by reason of the fact that his building is in the immediate vicinity of the obstruction, sustains a damage thereby not common to the rest of the public. Cases of special damages growing out of an unlawful obstruction of the highway will generally be found to be cases where, by reason of the peculiar situation of the plaintiff, the obstruction cuts off his access to and egress from his premises or place of business, or render it more tedious, or more circuitous, and hence more expensive. We are also disposed to concede that an obstruction of such a nature as to turn the tide of travel away from the door of a building so much as to injure the plaintiff's trade, if a tenant, or his rents if a landlord, would be such an obstruction of the highway as if otherwise unlawful, would be enjoined in a court of equity. But that is not the case here. These telegraph poles do not in any way obstruct the passage of the vehicles, and though they may in some small degree incommode foot travel, it is not a reasonable conclusion from the evidence that they so much obstruct it as to cause any peculiar damage to this plaintiff.

In *Clausen v. Balt. & Ohio Tel. Co.*, N. Y. Supreme Court Chambers, N. Y. Daily Reg. Sept. 19, 1884, it was held that if the proposed poles would interfere with or obstruct the light, air or access to any building which the abutting owner might erect, or render more difficult the access to his premises under any use to which they might be applied, he was entitled to compensation before their erection.

In *Board of Works v. United Kingdom Telephone Co.*, Ct. of App., 51 L. T. Rep. (N. S.) 148, the court refused to restrain defendants from fastening wires to a chimney and stretching them across a street at a height of thirty feet, there being no evidence that they were dangerous. The court held that they were above the "street" of which alone the plaintiff had jurisdiction.

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In *American Union Telegraph Company v. Town of Harrison*, 81 N. J. Eq. 637, it was held that under a statute of New Jersey giving the municipal authorities the right to regulate and restrict the use of public streets by incorporated telegraph companies, the authorities may not lay an embargo nor interdict; but their regulations must be reasonable and fair, and in the absence of any regulations they cannot compel the telegraph company to desist from constructing their work, in a case where the poles are erected outside of the street on private property, and the wires as they overhang the streets do not impede or endanger the use of such streets.

The interference of a court of equity by injunction was invoked on the ground that the defendant was resisting the erection of the wires by force, almost to riot and bloodshed. The court observe:

"The complainants were organized under the general telegraph law. Revision 1174. The eighth section is the only part of the act containing any thing material to this controversy. It first grants to any corporation organized under it the right to use the public highways of the States for the purpose of erecting posts or poles, upon first obtaining the consent in writing of the owners of the soil. It then provides that no posts or poles shall be erected in any street of any incorporated town, without first obtaining from the town a designation of the streets in which the same shall be placed, and the manner of placing the same. This beyond all doubt must be construed to be a plain inhibition against the use of the streets by any telegraph company for the purpose of erecting their poles therein without first applying to the municipal authorities for direction as to where and in what manner they shall be erected. The legislative purpose is very plain. The design is to invest telegraph companies with the right to use the streets of an incorporated town for the purpose of erecting their poles therein, subject nevertheless to such municipal control as shall be necessary to secure to the public, safety, convenience and freedom in the use of the streets. The municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured, but they have no power to lay an embargo. They have a right to regulate but not to interdict, and their regulation to be valid must be reasonable and fair. But this provision has no application to the case in hand. The complainants have erected their poles outside of the streets on private property, and so long as the poles in no way imperil the safety of those who use the streets, the town authorities can lawfully exercise no control over them. But another part of this section must be considered. By the last clause it is enacted 'that the use of the public streets in any of the incorporated towns (by any corporation organized under this act), shall be subject to such regulations and restrictions as may be imposed by the corporate authorities.' The clause previously considered related only to such use of the streets as would be made if poles were erected therein. The clause just quoted is much broader, and comprehends any use which can be made of them by a telegraph company. It comprehends hanging wires over the roadway. The public easement is not limited to the use of the soil of the highway, but extends upward indefinitely. A barrier stretched above the roadway, or the bough of a tree overhanging it, may constitute a nuisance. *Barber v. Roxbury*, 11 Allen, 320:

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Angell Highways, § 223. Under this clause the town authorities may adopt regulations fixing the elevation at which telegraphic wires shall cross the streets, and they may also prescribe such other precautions as may be reasonably necessary to the safety of travel. But no such regulations have been adopted by the defendants. So far as appears, the town authorities have never even entered upon the consideration of the question whether it is expedient or not to exercise the power given to them by this clause. When by appropriate proceedings they shall have prescribed regulations upon this subject, the complainants will be obliged to conform to them, but in the meantime they cannot compel the complainants to desist from the further construction of their work. Upon the facts before me there is no reason whatever to believe that the wires as they now overhang the streets do in the slightest degree impede or endanger their full, free and safe use. I am of the opinion that the complainants in erecting their poles on private property, and in hanging their wires on them at an elevation of twenty-five feet above the roadway, did nothing but what they had an unquestionable legal right to do, and that the defendants should be enjoined from cutting the wires, or otherwise unlawfully interfering with them."

In *Reg. v. United Kingdom Electric Tel. Co.*, 9 Cox C. C. 174, it was held that the erection of telegraph posts in any portion of a highway, rendering it less commodious, although not in the travelled portion, is a nuisance at common law, and the fact that a sufficient space for travel is left is no defense, unless the act is done under legislative sanction. So of laying wires in tubes under a highway. *Attorney-General v U. K. E. Tel. Co.*, 80 Beav. 287.

See *Pierce v. Drew*, 186 Mass. 75; s. c., 49 Am. Rep. 7.

In *Roake v. American Telephone and Telegraph Company*, 41 N. J. Eq. 85, it was held that where complainant's right, as an abutting lot-owner, to prevent the defendant from stretching its wires over the land in the street in front of his lot, defendant claiming to act under statutory and municipal authority, is debatable, a preliminary injunction to restrain defendant's proceeding will not be allowed. The chancellor said "The city claims that it has the right to use the streets for the purpose of telegraphic or telephonic communication; that such use is part of the public uses to which the streets of a city may lawfully be put by the city authorities without the consent of the owners of lots abutting on the streets, or making compensation to them. It has been so adjudged in Massachusetts. In *Pierce v. Drew*, 186 Mass. 75, it was held that the appropriation of a public highway for the use of a line of electric telegraph, by the erection of poles thereon and stretching wires upon the poles above the surface of the ground, does not impose an additional servitude, and that a statute authorizing such use is constitutional, although it does not provide for compensation to the owner of the fee of the highway. The Legislature of this State appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the street; for while it recognizes such rights as to the erection of poles, it does not do so as to the wires. It is laid down that if telegraph posts be erected within the limits of a street or highway without legislative authority, they are nuisances; but that if the erection be thus authorized, they are not 2 Dill. Mun. Corp., § 552. In the case in hand the company does not, as before

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stated, intend to erect poles on the land in front of the complainant's lot, but means merely to stretch its wires along the front, at least twenty-five feet above the ground, on poles erected on adjacent or neighboring property. The present injury from such use cannot be great. It certainly is not so great as to warrant a preliminary injunction. A preliminary injunction will never be ordered unless from the pressure of an urgent necessity. The damage threatened to be done, and which it is legitimate to prevent during the pendency of the suit, must be, in an equitable point of view, of an irreparable character."

In *People v. Met. Tel. Co.*, 64 How Pr. 120, it was held that if telegraph poles incommode the public use of the street in consequence of their size and height, they may be treated as a public nuisance, but the question is one of fact.

The subject of overhanging obstructions and poles has been treated in the following cases: *Grove v. Fort Wayne*, 45 Ind. 429; s. c., 15 Am. Rep. 262, and note, 269 (cornice); *Jones v. Boston*, 104 Mass. 75; s. c., 6 Am. Rep. 194 (sign); *Taylor v. Peckham*, 8 R. I. 349; s. c., 5 Am. Rep. 578 (sign); *Hewison v. City of New Haven*, 37 Conn. 475; s. c., 9 Am. Rep. 342; *Salisbury v. Herchenroder*, 106 Mass. 458; s. c., 8 Am. Rep. 354 (sign); *French v. Brunswick*, 21 Me. 29 (rope); *Day v. Milford*, 5 Allen, 98 (awning); *Jones v. New Haven*, 34 Conn. 1 (limb of tree); *Norristown v. Moyer*, 67 Penn. St. 355 (pole); *Hume v. Mayor*, 47 N. Y. 639; *Reimer's Appeal*, 100 Penn. St. 182; s. c., 45 Am. Rep. 378 (bay window); *Appeal of Penn. Lead Co.*, 96 Penn. St. 116; s. c., 40 Am. Rep. 649 (liberty pole); *Simon v. City of Atlanta*, 67 Ga. 618; s. c., 44 Am. Rep. 789 (rope); *Bohen v. City of Waseca*, 32 Minn. 176; s. c., 50 Am. Rep. 564; *City of Wellington v. Gregson*, 31 Kans. 99; s. c., 47 Am. Rep. 482 (post); *Hawkins v. Sanders*, 45 Mich. 491 (awning); *Beecher v. People*, 38 Mich. 289; s. c., 31 Am. Rep. 816 (roof).

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(4 Mackey, 489.)

Criminal law homicide - insanity - juror.

There is no grade of insanity sufficient to acquit of murder but not of manslaughter.

One who is exempt from jury duty may waive his privilege and legally sit as a juror.

CONVICTION of murder. The opinion states the case.

Jas. W. Walker and *Thos. C. Taylor*, for defendant.

A. S. Worthington, for the United States.

MERRICK, J. This was an appeal from the Criminal Court where there was an indictment and conviction of murder, the de-

defendant excepted for error in refusal by the court of an instruction and also made a motion for a new trial upon the ground that one of the jurors was incompetent. The instruction which he prayed, and which was refused, is in these words :

“ If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong; yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter.”

The first criticism to be made upon the application for the reversal of the judgment of the court below in refusing this prayer is, that there was no evidence whatsoever upon which to found the prayer. There was no suggestion of any insanity on the part of the defendant, and no evidence tending to prove in any manner that he was insane; and the only ground upon which it was argued here that a prayer of that sort should be granted was because the offense was a very barbarous one in itself.

The authorities are explicit that the barbarous manner in which a homicide is committed does not in itself furnish any basis for the defense of insanity. But above and beyond that the prayer is inconsistent with itself—is incongruous and radically vicious. It rests upon the idea that there is a grade of insanity not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder.

The law does not recognize any such distinction as that in the forms of insanity. The rule of law is very plain that in order that the plea of insanity shall prevail, there must have been that mental condition of the party which disabled him from distinguishing between right and wrong in respect of the act committed.

Now if the prisoner was so far capable of distinguishing between right and wrong as to be guilty of the crime of manslaughter, he surely was capable of distinguishing between right and wrong in respect of the crime of murder of the identical party. There can be no recognition of the doctrine that a man is incapable of distinguishing between right and wrong so as to determine that the

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case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. There is no such doctrine, and nothing in the books that favors any such idea. The prayer therefore is unsound in all respects, and even if it had been sound, not being supported by evidence, the court below was entirely justified in rejecting it.

There is another objection made upon the motion for a new trial to the effect that one of the jurors was incompetent to sit because he had been the holder of a subordinate office under the District of Columbia. The jury law exempts from service on juries parties who are engaged in public office, whether on the part of the government or on the part of the District of Columbia. It exempts other classes of persons also from jury duty, but the persons exempted are not disqualified as jurors. It is simply the privilege of the party to become exempt from jury service on account of other engagements. But he has the capacity the faculty to be a juror. It is his own personal privilege, and he alone is the party who shall take advantage of it. If he pleases to waive that privilege he is still a competent juror, and he has all the functions and powers which the law imputes to a man as necessary to constitute one of the twelve triers of an accused. This objection therefore affords no ground upon which a motion for a new trial can be sustained.

This subject has frequently been before the courts and the doctrine is very thoroughly and conclusively established. It is laid down in Bishop on Crim. Proc. in the third edition at section 886. But the most recent case in which the subject has been exhaustively considered and all the authorities of all the States brought together, is to be found in *Green v. State*, 59 Md. 123; s. c., 43 Am. Rep. 542. There the Court of Appeals reviews all the decisions both in England and in this country upon the subject, and it needs only to refer to that case for the sufficient reasonings upon which they maintain and confirm the justice of the rule of law that where a person is exempted from service on a jury he is not thereby disqualified. It is his personal privilege only, and unless he please to take advantage of it, it cannot be taken advantage of on a motion for a new trial.

Those were the only two objections presented why the judgment of the court below should not be affirmed by this court, and finding no sufficient cause for reversing the judgment upon either of these reasons, it will be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

WESTERN UNION TELEGRAPH COMPANY V. McGUIRE.

(104 Ind. 180.)

Telegraph requirement of deposit.

The rule of a telegraph company that a transient person sending a message requiring an answer must deposit enough money to pay for ten words is reasonable, and unless complied with the company may refuse to send the message

ACTION for penalty. The opinion states the case. The plaintiff had judgment below.

J. R. Coffroth, T. A. Stuart, B. K. Higinbotham, J. A. Stein and M. Bristow, for appellant.

A. E. Paige, S. O. Bayless and W. H. Russell, for appellee.

ELLIOTT, J. The complaint seeks a recovery of the statutory penalty for a failure to transmit a telegraphic message. The answer of the appellant is substantially as follows: "The defendant says that it did fail and refuse to transmit the message set forth in the complaint, but defendant says that the plaintiff was a stranger in Frankfort and a transient person therein: that the said message was one that required an answer; that the defendant has, and had

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at the time, as one of its general rules and regulations of business, regularly adopted for the government of the operators and agents of said company, the following rule: 'Transient persons sending messages which require answers must deposit an amount sufficient to pay for ten words. In such case the signal, "33" will be sent with the message, signifying that the answer is prepaid;' that the defendant's agent, to whom said message was offered, informed the plaintiff of the existence of said rule and what said rule was, and that the amount required to be deposited was twenty-five cents; that thereupon the plaintiff refused to comply with said rule and make said deposit."

To this answer a demurrer was sustained, and on this ruling arises the controlling question in the case.

One of the incidental and inherent powers of all corporations is the right to make by-laws for the regulation of their business. There is no conceivable reason why telegraph corporations should not possess this general power; nor is there any doubt under the authorities that this power resides in them. *Western Union Tel. Co. v. Jones*, 95 Ind. 228; s. c., 48 Am. Rep. 713, *vide* opinion, p. 231, and authorities cited; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 744; *True v. International Tel. Co.*, 60 Me. 9; s. c., 11 Am. Rep. 156; Scott & J. Law of Tel., § 104.

Affirming, as principle and authority require us to do, that the telegraph company had power to make by-laws, the remaining question is whether the one under immediate mention is a reasonable one. It is established by the authorities that an unreasonable by-law is void. *Western Union Tel. Co. v. Jones*, *supra*; *Western Union Tel. Co. v. Buchanan*, *supra*; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c., 44 Am. Rep. 776; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c., 45 Am. Rep. 480, see authorities, note, pages 491, 492.

It is for the courts to determine whether a by-law is or is not an unreasonable one, and this is the question which now faces us. 1 Dill. Mun. Corp. (3d ed.), § 327; Scott & J. Law of Teleg., § 104.

We are unable to perceive any thing unreasonable in the by-law under examination. A person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the

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expense of its transmission. The telegraph company has a right to proceed upon this natural inference and to take reasonable measures for securing legal compensation for its services. It is not unnatural, unreasonable or oppressive for the telegraph company to take fair measures to secure payment for services rendered, and in requiring a transient person to deposit the amount legally chargeable for an ordinary message, it does no more than take reasonable measures for securing compensation for transmitting the asked and expected message.

We have found no case exactly in point, but we have found many analogous cases which in principle sustain the by-law before us. *Western Union Tel. Co. v. Carey*, 15 Mich. 525; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; *Vedder v. Fellows*, 20 N. Y. 126; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *McAndrew v. Electric Tel. Co.*, 33 Eng. L. & Eq. 180; *Western Union Tel. Co. v. Blanchard*, *supra*, see authorities cited, note, 45 Am. Rep. 489; *Western Union Tel. Co. v. Jones*, *supra*.

Judgment reversed with instructions to overrule the demurrer to the answer and to proceed in accordance with this opinion.

Judgment reversed.

Petition for a rehearing overruled.

SUPREME COUNCIL OF ORDER OF CHOSEN FRIENDS V. GARRIGUS.

(104 Ind. 133.)

Insurance — accident — injury in affray.

An injury sustained by one in an affray, without his fault, is an accident within the meaning of an insurance contract. (See note, p. 302.)

ACTION on an insurance contract. The opinion states the case. The plaintiff had judgment below.

F. M. Finch and *J. A. Finch*, for appellant.

S. M. Shepard, *C. Martindale* and *L. C. Garrigus*, for appellee.

ZOLLARS, J. Appellee brought this action to recover from appellant \$1,500, which he claims is due him under the charter, consti-

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tution and by-laws of the order. The order was incorporated under section 3502, R. S. 1881. Some of its principal objects, as declared in the articles of incorporation, are to unite its members in bonds of fraternity, aid and protection, to improve the condition of the members morally, socially and materially; and to establish a relief fund, from which members, who have complied with all its rules and regulations, or persons by such members lawfully designated, or the legal heirs of such members, may receive a benefit in a sum not exceeding \$3,000, which shall be paid either when a member reaches the age of seventy-five years, or when, by reason of disease or accident, such member becomes permanently disabled from following his usual or some other occupation, or upon satisfactory evidence of the death of such member, and when all the conditions regulating such payment have been complied with.

[Omitting other statements.]

The relief fund laws adopted by the order provide for the creation of a relief fund. One section of these laws provides that upon permanent disability one-half of the amount named in the relief fund certificate held by the member shall be paid to him at once.

Another section is as follows: "Should a member become permanently disabled from following his or her usual or other occupation, by reason of disease or accident, on receipt of the proper notice the supreme council shall order a board of three physicians (who shall be members of the order, if possible) to be selected by the subordinate council, whose duty it shall be to make a careful examination of the member's condition, report as to the permanency of the disability, and upon the recommendation, and the approval of the supreme medical examiner, the member shall be entitled to one-half the benefit, provided, that where the disability is caused by accident, and is patent to the eyes of all, the examination by the board of physicians may be dispensed with," etc.

Another section provides that upon receipt of the proper notice of the permanent disability of a member, the supreme recorder shall draw an order on the supreme treasurer in favor of such member for the amount, and forward the same to the treasurer of the subordinate council of which the disabled person is a member.

Another section provides that the treasurer of the subordinate council shall deliver the order to the member, and receive from him his relief fund certificate.

Basing his claim upon these provisions of the articles of incorpo-

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ration, the constitution, by-laws and relief fund laws, appellee charges in his complaint that the supreme council instituted and established a subordinate council in the State of Kentucky, known as Logan Council No. 12, of which he was and is a member, holding a relief fund certificate for \$3,000; that in May, 1883, without any agency, fault or negligence on his part, he received a pistol-shot wound in the elbow, which permanently disabled him from following his usual or other occupation, and that his disability was and is patent to the eyes of all. He however, through the Logan council, notified the supreme council, and it in turn notified the Logan council to appoint a board of physicians to examine the injury. The board was appointed and reported in favor of allowing and paying to appellee \$1,500, the one-half of the amount named in his relief certificate. Appellant has refused and still refuses to pay the amount.

The third paragraph of the answer charges that appellee should not recover in this action for this reason, among others, that he "became engaged in an affray with a party or parties whose names are unknown to the defendant, during which he, the plaintiff, received a pistol shot wound in the right arm, said wound being inflicted willfully and intentionally by said third party or parties," and that the same was therefore not accidental. It is further charged that appellee was not thereby permanently disabled from following his usual occupation. There are many other averments in this paragraph, but the above are the real questions presented thereby.

The third answer is an attempt to meet and overthrow the case as made by the complaint by alleging that appellee became engaged in an affray, and that the pistol-shot wound was intentionally inflicted by the adversary or adversaries. The argument is that the injury having been intentionally inflicted in an affray, was not an accident, and that hence appellee cannot recover.

Our statute provides that if two or more persons, by agreement, fight in any public place, the persons so offending are guilty of an affray. R. S. 1881, § 1980. To be engaged in an affray under this statute, both parties will be guilty of a violation of the law, because the fighting must be by agreement. We have no knowledge however that such a statute is in force in Kentucky, where appellee received the wound, and where it is alleged in the answer he received it. We cannot therefore give to the word "affray," as used in

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the general charge in the answer a meaning broader than the usual and ordinary signification of the word. Ordinarily, an affray means simply the fighting of two or more persons in some public place, to the terror of others. Mr. Roscoe, in his work on Criminal Evidence, at page 270, says: "It differs from a riot, in not being pre-meditated. Thus if a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it); because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention." It will thus be seen that the common-law definition of an affray does not involve an agreement to fight, as does our statute. We must presume that the common law is in force in Kentucky. It might be therefore that appellee was engaged in an affray in Kentucky without having agreed to fight, and without any culpable fault on his part.

The charge that appellee was engaged in an affray is moreover the statement of a conclusion, and is not sufficient to meet the averments in the complaint, that appellee received the wound without any agency, fault or negligence on his part. If the facts were stated instead of the conclusion, as the rules of pleading require, it might appear that the only part that appellee took was in defense of his person against the assaults of his adversary or adversaries, and that thus whatever injuries he received were received without any fault or wrong on his part. Nor will it do to say, that because the injury was intentionally inflicted by the assailant and wrong-doer, it was not an accident to appellee, within the meaning of the word "accident," as used in the relief fund laws, etc., of the order. To thus limit the word "accident," would be to thwart the manifest object of the order and deprive the members of the benefits they have a right to expect upon the payment of their dues and assessments. The word "accident," as used in those laws and in the relief fund certificates held by the members, should be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation. It will not do to say, that because a desperado waylays, assails and wounds a member intentionally, that wounding is not an accident to the member, within the laws, etc., of the order.

It follows from what we have said, that the court below at General

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Term, did not err in reversing the decision at Special Term, and in remanding the cause to the Special Term, with directions to sustain appellee's demurrer to the second, third and fourth paragraphs of appellant's answer.

The judgment at General Term is affirmed, at appellant's costs.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Mallory v. Traveller's Ins. Co.*, 47 N. Y. 52; s. c., 7 Am. Rep. 410, *No. Am. Life and Acc. Ins. Co. v. Burroughs*, 69 Penn. St. 43; s. c., 8 Am. Rep. 212, and notes; *Schneider v. Prov. Ins. Co.*, 24 Wis. 28; s. c., 1 Am. Rep. 157; *Pollock v. U. S. Mut. Acc. Asso.*, 102 Penn. St. 230; s. c., 48 Am. Rep. 204.

Misfortunes in business, whereby one is prevented from making a payment do not constitute an "accident." *Langdon v. Brown*, 46 Vt. 512. Residing out of the State, whereby one does not hear of the death of a testator and the probate of his will, does not constitute an "accident." *Burbeck v. Little*, 50 Vt. 713.

"An accident is 'an event from an unknown cause,' or 'an unusual and unexpected event from a known cause,' 'chance, casualty.'" The court distinguished between "accident" and negligence. *Crutchfield v. Richmond, etc., R. Co.*, 76 N. C. 320.

Illness of counsel was held "accident" excusing a default in *Brown v. Elliott*, 17 N. J. Eq. 353.

The deceased being drunk fell off a bench in a bar room, and was placed on the floor with nothing under his head. There he died from apoplexy. Held, not a death from "accident." *Bobier v. Clay*, 27 Up. Can. Q. B. 438. The court cites the *Trew* and *Fitton* cases, and hold this "death from natural causes produced by the intoxicating liquor."

In *Sinclair v. Maritime Passengers' Assurance Co.*, 4 L. T. Rep. (N. S.) 15, death from sunstroke was held not death from "accident." COCKBURN, C. J., said: "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident and injury or death from natural causes, such as shall be of universal application. At the same time I think we may safely assume, that in the term 'accident,' as so used, some violence, casualty, or *vis major* is necessarily involved. We cannot think disease produced by the action of a known natural cause can be considered as accidental. * * * In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays."

In *Fenwick v. Schmalz*, L. R., 3 C. P. 313, it was held that a snow storm was not an "accident" within the exception of "riots, strikes, or any other accidents," in a charter party. WILLES, J., said: "An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things. A fall of snow is one of the ordinary operations of nature, and is an incident rather than an accident."

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Where one jumped from a car at a railway station and ran in great haste to find a man, and ruptured an abdominal muscle, *held*, not an "accident." "Assuming that the rupture was caused either by his jumping or running, or both, does not help the matter, unless we call running and jumping accidents." *Southard v. Ry. Pass. Ass. Co.*, 34 Conn. 574.

"The word accident, when used to express a result produced by human action, is generally if not universally understood to mean a thing done or a disaster caused or produced without design or unintentionally." *Blue Wing v. Buckner*, 12 B. Monr. 250.

"An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest; or an event resulting undesignedly and unexpectedly from human agency alone; or from the joint operation of both." *Morris v. Platt*, 32 Conn. 85.

"The equitable definition of the term 'accident' includes not only inevitable casualties, and such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses and acts or omissions of other persons." *Bostwick v. Stiles*, 35 Conn. 198. So the failure of a party to furnish promised money to enable the plaintiff to pay a mortgage was held an "accident."

"This term in our jurisprudence means not merely inevitable casualty, or the act of God, or what is called *vis major* or irresistible force, but also such unforeseen events, misfortunes, losses or omissions as are not the result of any negligence or misconduct in the party who seeks the relief." *Alexander v. Bailey*, 2 Lea, 686. So where the party was prevented from redeeming land, being misled by a false record of the court, this was held an "accident."

"Strictly speaking, an accident is an occurrence to which human fault does not contribute; but this is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men." ELLIOTT, J., in *Nave v. Flack*, 90 Ind. 205; s. c., 46 Am. Rep. 205.

In *Field v. Davis*, 27 Kans. 400, an action of damages for personal injuries by negligence, the plaintiff broke his ankle by jumping from a wagon, the mules having become restive and backing into a dangerous position. The court below spoke of the occurrence as an "accident." On review the court said: "Now such word is often used in similar cases, and is probably about the best word that could be used in such cases. It has various shades of meaning; but in such cases as this, it probably means an event from some cause whose nature and character are yet unknown, but which is submitted to the court and jury upon the evidence for the purpose of having the same duly and legally ascertained and determined. We think it is fair to call such an event an accident until its nature is legally ascertained, and the event known to be either a culpable consequence of some negligent act or omission, or an innocent, unforeseen, fortuitous casualty, for which no one is culpably responsible."

In *Rodey v. Travellers' Ins. Co.*, Supreme Court of New Mexico, January 15, 1886, 9 Pac. Rep. 848, it was held that under an accidental insurance policy one might recover for an injury to the ear while diving for sport. The court

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said: "The theory of the plaintiff is that he went in bathing at the Terrace bath while on a trip to California; that from external violence while so bathing the tympanum of his ear was broken or injured, causing him severe sickness, injury and damage. The defendant maintains the injury did not so occur, but resulted from coughing, or at most only from contact with water, by diving in the usual and ordinary course of common bathers. * * * The plaintiff was a witness on his own behalf. He testified in substance that he went into the bath as other bathers did, but was milder in exercise than most of them. * * * It is beyond doubt, from this, the jury might have found the verdict returned in this case on the ground that the injury was the result of violent external causes.' The weight of the evidence is clearly that way. The witness states in positive terms: 'My ear was ruptured by the external violence of the water in diving.' From the evidence the conclusion reasonably follows that he leaped from a plank for the purpose of diving into the deep water. A slight accidental turn of the body while descending into the sea might very easily bring his ear in contact with the water in such manner that the force of his passage through it would create the injury. If there is evidence reasonably tending to support the verdict on appeal, after the trial court had opportunity to consider its weight, the Supreme Court will not interfere."

BURK V. SIMONSON.

(104 Ind. 173.)

Eminent domain — canal — abandonment.

Where land is condemned for the right of way of a canal, and embankments and structures are erected to protect a riparian owner's land, and are maintained until the statute of limitations has run, on the abandonment of the canal the land owner is entitled to have the embankment and structures remain.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

F. Adkinson, A. W. Gaines, R. Hill & R. N. Lamb, for appellant.

H. S. Given, H. D. McMullen & D. T. Downey, for appellee.

ELLIOT, J. There are four paragraphs in the appellant's complaint, and to all of them demurrers were sustained.

Shortly stated, the case made by the complaint is this: The appellant inherited land from his father, who acquired it in 1809;

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the appellee owns land lying adjoining and immediately above that owned by the appellant. In 1838 the Whitewater Canal Company acquired the right of way for the construction of a canal through the lands now owned by these parties, and constructed a canal upon the right of way so acquired. In constructing the canal, a ditch twenty-five feet deep and twenty feet wide was dug along the bank of the Whitewater river. For the purpose of obtaining water for the canal, a feeder-dam was constructed across that river opposite the appellee's land, and a ditch cut from the river to the canal. To protect the land now owned by these parties from being flooded, and to regulate the flow of water from the river into the canal, the company constructed a lock, with stone walls and abutments, by means of which the water was conducted into the canal without injury to adjoining lands. The construction of the dam raised the bed of the river because of the sediment which it caught and caused to be deposited. In 1866 the dam was broken, and the greater part washed away. The canal was then abandoned, but the canal, with all its appurtenances, still belongs to the Whitewater Canal Company. In the condition that the lock, appurtenances, and the embankments now are, no water flows into the canal when the river is in its usual stage, but in times of ordinary freshets it does flow from the river into the channel of the canal. If the lock, appurtenances and embankments are removed, the water from the river will flow into the channel of the canal, the land of the appellant will be flooded, and his soil washed away. The lock and embankments are necessary to prevent the flooding of the land, and their removal will expose it to injury from overflows. The appellee, without right, is engaged in tearing away the lock and its appurtenances.

The lock and appurtenances did not belong to the appellant, and he cannot maintain an action as owner, although the appellee is a trespasser.

If there is any cause of action in the appellant, it must rest upon the ground that he has acquired a right to have the artificial structures, the lock, abutments, and embankments remain unchanged. If there were an express contract vesting in him this right, there would be comparatively little difficulty in the case, but no such contract exists, and we are to examine what grounds, if any there are, upon which the asserted cause of action can be justly placed.

It is said that one riparian owner must so use the waters of a stream as not to injure other proprietors. We grant this proposition as applied to natural streams, but it does not meet this case. Angell Water-courses, §§ 332, 335, 339; *Hebron G. R. Co. v. Harvey*, 90 Ind. 192; s. c., 46 Am. Rep. 199; *Pence v. Garrison*, 93 Ind. 345; *Harris v. Macintosh*, 133 Mass. 228. The question here is, not as to the right to divert the waters of a natural stream, but as to the right to remove artificial structures and embankments erected in changing the state of a natural stream, and thus restore the stream to its original condition. To such a case the doctrine found in *Pence v. Garrison*, *supra*, and 1 High Injunctions, §§ 794, 815, does not apply.

Eliminating, as we have done, the irrelevant arguments advanced, and clearing the case of matters foreign to its merits, we find the real question to be this, has the appellant a right to have continued the artificial structures which so changed the natural water-course as to protect his land from injury?

Upon this question the law is with the appellant. There are two reasons for this conclusion. Of these in their order: First. The long acquiescence in the change made in 1838 precludes a restoration of the stream and its surroundings to their original condition.

Our proposition is well supported by authority. *Middleton v. Gregorie*, 2 Rich. (S. C.) 631, is a well-reasoned case, and we make the following extract from it: "No one has a right to divert a stream from its natural current, to the prejudice of those who own lands below. But where it has been done by a party above for twenty years, his original wrong has ripened into a prescriptive right. Let the proposition be reversed. Is the party below incapable of acquiring a right of exemption from having his land overflowed, by the water's being restored to its natural course? This is what the plaintiff contends for. He says, for more than forty years he has accommodated himself to a state of things existing by mutual consent, or brought about by the acts of the planters above. By way of illustrating his position, suppose that in consequence of the dam he had cut down and drained the land lying next to the river, and had planted in it some crop requiring entirely a dry culture, such as corn or cotton. Would the defendant have a right to cut his dam and destroy the growing crop? For all legal purposes, the plaintiff might under such circumstances have regarded his land

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as though the water had never flowed through it. Indeed I think he would have as much right to enjoy his property in security, as if he had cultivated dry land above, and it is very clear, that where one has land lying adjacent to a stream, and a proprietor below dams the water back on him, the former has a right of action to abate the nuisance."

In *Woodbury v. Short*, 17 Vt. 387; s. c., 44 Am. Dec. 344, it was held, that after ten years' acquiescence in the change of a natural stream, a riparian owner cannot restore a stream to its original condition where it would injure another owner. The subject received more careful consideration in the case of *Ford v. Whitlock*, 27 Vt. 265, where it was said: "But if the diversion affects other proprietors favorably, and the party on whose land the diversion is made acquiesces in the stream running in the new channel, for so long a time that new rights may be presumed to have accrued, or have in fact accrued, in faith of the new state of the stream, the party is bound by such acquiescence, and cannot return the stream to its former channel." It is said by a recent writer that "when a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully returned to its former channel." Gould Waters, § 159.

Of the second reason for our proposition: Where land is acquired for a public purpose, as a canal, railroad, or the like, direct benefits to the owner from its construction are deemed part of the consideration paid by the corporation acquiring the right to construct the public work. This was so under the act which created the White-water Canal Company and endowed it with corporate powers. *McIntire v. State*, 5 Blackf. 384; *State v. Digby*, 5 Blackf. 543; *Vanblaricum v. State*, 7 Blackf. 209. If embankments and abutments essential to the construction and maintenance of the canal did protect the appellant's land from overflow, they were to that extent a benefit, and the presumption is that this benefit was taken into consideration, for the ordinary rule is, that a contract for a right of way for a canal, or a condemnation for that purpose and the assessment of damages, includes all direct benefits and damages, thus precluding an owner from maintaining a subsequent action for

damages. Where the use of land is continued for such a period as to permit the running of the statute of limitations, the presumption is that all damages were assessed and paid. *Brookville, etc., Co. v. Butler*, 91 Ind. 134; s. c., 46 Am. Rep. 580; *Nelson v. Fleming*, 56 Ind. 310. The same principle must apply here ; it must be presumed that the long acquiescence of the owner of the fee was due, in part at least, to the benefit which accrued to his land from the embankments and structures constructed by the canal company.

The abandonment of the canal did not divest the appellant of his rights nor invest the appellee with authority to deprive him of them. The embankment which protected the latter's land was a benefit to him, and this benefit could not be taken from him. The right thus secured him was a permanent one.

If the appellee or his grantors had in no way consented to the erection of the embankments, he would not be bound by the act of the canal company, but consent was originally given to the change in the state of the water-course, and for a long series of years the change was acquiesced in by all who were interested in the matter. The building of the dam, the digging of the channel of the canal, the construction of the lock, and the erection of the embankments, were parts of one general undertaking, in which the canal company and the adjoining owners were interested and to which they mutually consented.

Where a defendant is undertaking to destroy an existing water-course, or to wrongfully change the existing state of the stream, so as to materially injure the plaintiff's land, the latter is entitled to an injunction. *Pence v. Garrison, supra* ; *Oliver v. New York Bay Cem. Co.*, 38 N. J. Eq. 109; Gould Waters, § 513.

Where a cause is submitted by agreement, a motion to dismiss, on the ground that notice of the appeal has not been given to co-parties, comes too late to be of avail. 2 Works Pr., § 1094, auth. n; *People's Savings Bank v. Finney*, 63 Ind. 460; *Field v. Burton*, 71 Ind. 380; *Easter v. Severin*, 78 Ind. 540; *Hendricks v. Frank*, 86 Ind. 278; *Martin v. Orr*, 96 Ind. 491.

Judgment reversed.

Petition for rehearing overruled.

Bryan v. Lyon.

BRYAN V. LYON.

(104 Ind. 237.)

Marriage — divorce — custody of children.

The custody of children having been awarded to the mother on divorce, on the ground that the father was unfit, and the mother having died, the father, on showing his fitness, may recover the children.

HABEAS CORPUS. The opinion states the case. The respondent had judgment below.

S. B. Vance, for appellant.

J. M. Shackelford and *A. L. Doss*, for appellees.

ZOLLARS, J. By a proceeding of *habeas corpus*, appellant seeks to recover the custody of his two children; one of whom, a little boy ten years old, is in the custody of appellee Lyon, and the other, a little girl eight years old, is in the custody of appellee Ferguson. He filed a separate complaint against each of the appellees. The cases were put at issue, and by the agreement of the parties tried together and come here practically as one case. He alleged in his complaint, that on the 2d day of April, 1874, he and Sallie R. Lyon, who is now dead, were married; that the two children were born of that marriage, and that appellees wrongfully have and retain them in their custody.

A writ was awarded, and appellees jointly and separately made returns thereto. For the purposes of this decision we need only set out the separate return by Lyon. It is as follows:

[Omitted.]

It is charged in the return that appellant ought not to have the custody of the children, because from the time of their birth he had virtually abandoned them and their mother; that she instituted a suit for divorce in 1878, when the younger child was very young, alleging in her complaint such abandonment and failure to provide the necessities of life for her and the children, and that on account of his utter worthlessness he was unfit to have the custody of the children. It is further alleged in the return, that after proper notice, appellant, by his default, allowed those charges to go as confessed,

and allowed the custody to be awarded to the mother; that from that time, in February, 1878, until the mother's death, in August, 1884, she supported the children by teaching school, without any aid or care from appellant; that in the meantime he had married another woman, by whom he had one child, now living with its mother's relatives, she being dead; that he has no home of his own; that he is a travelling salesman; that if given the custody of the children he will take them out of the State, and place them with his two sisters, who are utter strangers to them and live with their father in Missouri, who is also a widower.

These several statements in the return, in connection with the other statements therein, that the children are now comfortably situated with their mother's relatives, and being well cared for and educated, are as we have before stated, sufficient to justify the court in refusing to strike down the return, and in holding the case for a hearing. Under the above statute, all else being equal, the custody of minor children should be awarded to the father.

[Minor matters omitted.]

It is argued by counsel for appellees, that the judgment of the court in the divorce case, awarding the custody of the children to the mother, was and is conclusive against any claim by appellant for such custody, notwithstanding the facts that the mother is dead, and that this controversy is between the father and other parties. We need not here intimate an opinion as to how much weight that argument might be entitled to were the mother alive, and this controversy were between her and appellant. However that might be, we are well satisfied that the judgment in the divorce case did not, and could not forever cut off and bar appellant's right to the custody of his children. By reason of his neglect at the time, and prior to the divorce case, and perhaps for other reasons, he might have been an unsuitable person at that time to have the care and custody of the children, and especially might that have been so, as between him and the mother, the children being then quite young, and in need of a mother's care. It does not follow however that because he was at that time thus adjudged not entitled to the custody of the children, as against the claim of the mother, that adjudication shall be a perpetual adjudication of his unfitness, under all and changed circumstances, to have the custody of his children. The mother is dead. Her right to the custody of the children descended to no one. The status of the children, as fixed

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by the decree and judgment in the divorce case, has been destroyed by the death of the mother and custodian. Upon her death, no one had the right to the custody of the children, unless appellant, by reason of being their father and as such bound to maintain them, might claim that custody. It might well be that his circumstances have materially changed since the judgment in the divorce case, and that he has changed with them. From a negligent, neglectful, and unfeeling father, that he may then have been, it might well be that he has become in every way a fit and suitable person to have the custody, care, and training of his children.

If indeed such changes in him should be shown to have occurred, we know of no reason why he might not, as against all others, the mother being dead, assert and maintain his parental right to the custody of his children, notwithstanding that in a case between him and the mother of the children, she was adjudged to be the more suitable to have their custody and care. It might well be that changed circumstances have made it eminently proper that he, of all others, is the proper person to have the training of his children. Changed circumstances might be such that it would be a wrong to the children to deprive them of the fostering care of him who, above all others, would love and cherish them. Whether or not there have been such changes, it will be necessary for us to determine when we come to examine the evidence. We are cited by appellee's counsel to the case of *Wilkinson v. Deming*, 80 Ill. 342. In that case it appears that in a divorce proceeding between a husband and wife, the wife was granted a divorce and awarded the custody of the child. After the death of the mother the father commenced a proceeding in *habeas corpus* against the testamentary guardian of the child to recover its custody. In passing upon the relative rights of the parties upon appeal, the Supreme Court said that a decree of divorce being granted on the fault of the father, and giving the custody of the child absolutely to the mother, takes away, *ipso facto*, all control of the father over the child; that it nullifies, or at least neutralizes, the rule of the common law, and takes from the father all power thereafter over the infant until it shall be restored by the action of a proper court; that by the decree the infant is no longer the child of the divorced father, but is entirely under the control of the mother. This language must be limited to the case before the court, and in doing that, it must be remembered that the wife and mother, as she had a right to do under a statute then in force

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in that State, had by will appointed a guardian for the child, with the full right to its custody. Under the decree in the divorce case, the mother had the absolute custody of the child. Under the statute she had the right by will to transfer that custody to another.* Thus the right of custody continued with the mother while she lived, and by her will passed at once, upon her death, to the person named in her will. We have no such statute in this State, and hence what was said in that case is not authority here.

[Other matters omitted.]

Judgment affirmed.

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILROAD COMPANY V. NEWELL.

(104 Ind. 284.)

Evidence — declarations — expressions of pain.

In an action for damages for a personal injury, evidence of expressions by the injured person of pain and sickness and declarations as to its seat, at the time of or subsequent to the occurring of the injury, and without regard to whom made, is competent.†

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

H. H. Poppleton, A. C. Harris and W. H. Calkins, for appellant.

B. Harrison, C. C. Hines, W. H. H. Miller, J. B. Elam, J. W. Gordon and S. M. Shepard, for appellee.

MITCHELL, J. This action was brought by Lyne S. Newell against the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, to recover for alleged injuries to his person, suffered while being carried as a passenger from the city of Indianapolis to Bellefontaine, Ohio.

[Omitting other matters.]

* In *McKinney v. Noble*, 38 Tex. 195, it was held that the mother could not do this.—REP.

† To same effect, *Fay v. Harlan* (128 Mass. 244), 85 Am. Rep. 872; *Quaife v. Chi., etc., R. Co.* (48 Wis. 518), 83 Am. Rep. 821; *Hagenlocher v. Coney Island, etc., R. Co.*, 99 N. Y. 136.

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Subsequent to the commencement of the suit, the plaintiff submitted himself to an examination by Dr. Jameson. It may be inferred from the plaintiff's testimony, that the examination was procured for the double purpose of ascertaining the nature and extent of his injuries and of receiving treatment which was prescribed, and also to qualify the physician as a medical witness to represent his condition in the approaching trial. We infer however that Dr. Jameson knew no purpose beyond that of treatment at the time the examination was made.

At the proper time Dr. Jameson was called as a witness on plaintiff's behalf. In the course of his examination he was asked the following question: "Where did he complain of his injury—where did he say it was?" Over the defendant's objection, the witness answered as follows: "He said he was suffering a great deal of pain and tension in the lower portion of the back, in the lumbar region, across the small of the back." Again, the witness further on in his testimony said in answer to a series of questions: "That he complained of a sensation of numbness in the lower extremities, and those parts of the body below the part that would correspond with the injured part of his spine; and I think he complained, also, of a sense of constriction, but of that I would not be positive."

This ruling of the court is made one of the grounds of the motion for a new trial.

Counsel for appellant insist that exclamations of pain, in order to be admissible in evidence, must be contemporaneous with the alleged injury and the then existing facts, and that they must have been made before sufficient time elapsed to enable the person making them to form plans for future law suits.

They insist further that they must have been made *ante litem motam*, not only before suit brought, but before the controversy existed in any form.

In a general sense, and as applicable to a different class of cases, the rule as stated by counsel is approximately correct. Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of inquiry as to its severity, effect and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received, or subsequent to it, are admissible in evidence. *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138; *Town of Elkhart v. Ritter*, 66 Ind. 136;

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Howe v. Plainfield, 41 N. H. 135; *Towle v. Blake*, 48 N. H. 92; *Kenward v. Burton*, 25 Me. 39; *Hayatt v. Adams*, 16 Mich. 180; *Elliott v. Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668; *Brown v. N. Y. Cent. R. Co.*, 32 N. Y. 597; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487; *Johnson v. McKee*, 27 Mich. 471; *Earl v. Tupper*, 45 Vt. 275.

Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not is a question for the jury.

Such declarations and expressions are competent, regardless of the person to whom they are made. They are especially competent and of more weight when made to a physician for the purpose of receiving treatment, or to a medical expert who makes an examination at the request of the opposite party, or by the direction of a court, for the purpose of basing an opinion upon as to the physical situation of the person whose condition is the subject of inquiry. *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513; s. c., 33 Am. Rep. 821; *Atchinson, etc., R. Co. v. Frazier*, 27 Kans. 463.

It is only when such declarations assume the form of a narrative of past experience or suffering, or a relation of the cause and manner of the injury, or where they are made *ante litem motam* to one not an attending physician or a medical expert under the condition above mentioned, that their admissibility becomes the subject of serious discussion.

Statements of past sufferings and pains, when not made to a medical expert for the purpose of enabling him to form an opinion upon with a view to treatment or other legitimate purpose, are clearly inadmissible. *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Bacon v. Charlton*, 7 Cush. 581. And statements of the cause of the injury or of past occurrences, made to any one, unless made so nearly contemporaneous with the principal fact to which they relate, or unless they are made while the transaction is in progress, so as to constitute a part of the *res gestæ*, are also inadmissible. *Inhabitants, etc., v. Inhabitants, etc.*, 98 Mass. 47. When so related or connected as to become part of the *res gestæ*, they may be received as evidence bearing on the principal fact. *Insurance Co. v. Mosley*, 8 Wall. 397.

The rule is not to be extended beyond the necessity upon which

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it is founded. Past events and the manner in which an injury was received are ordinarily susceptible of proof by direct evidence.

For that reason such statements, not made contemporaneous with the occurrence, or so near it as to become part of the transaction, no matter to whom made, are inadmissible. *Chapin v. Marlborough*, 9 Gray, 244; s. c., 69 Am. Dec. 281; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438.

A physician may however testify to a statement or narrative given by a patient in relation to his condition, symptoms, sensations and feelings, both past and present, when such statements were received during and were necessary to an examination with a view to treatment, or when they are necessary to enable him to give his opinion as an expert witness. *Quarfe v. Chicago, etc., Ry. Co., supra*; *Barber v. Merriam*, 11 Allen, 322; *Looper v. Bell*, 1 Head, 373; *Yeatman v. Hart*, 6 Humph. 374; *Eckles v. Bates*, 26 Ala. 655.

The statements made by the plaintiff to Dr. Jameson, with which we are here concerned, do not appear to have been statements of past events or a narration of past sufferings, but of then existing pain. It is true they were made after the suit was commenced, and it may be said too they were not made wholly with a view of receiving medical treatment. It does appear however that treatment followed the examination, and so far as appears from the examining physician, the examination was made with that end in view. It may be conceded that statements made during an examination so brought about are not entitled to the weight they otherwise might have. We think they were nevertheless admissible in evidence, not for the purpose of establishing the truth of the statements made, but for the purpose of determining the basis upon which the opinion of the witness was founded. *Barber v. Merriam, supra*.

Since the witness was not applied to solely for the purpose of qualifying him to testify as an expert in the plaintiff's behalf, we need not determine the admissibility of statements made to experts in the course of an examination voluntarily applied for after suit commenced, which examination was had with no other purpose in view than that the examining physician should thereby become qualified to testify as a witness. That the evidence would be admissible in such a case is sustained by high authority, and that cases might arise in which such evidence would be admissible in order to prevent a failure of justice and protect the just rights of

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parties, seems scarcely to admit of doubt. That it should be admitted, if at all, under proper limitations, and subjected to scrutiny when admitted, may be conceded. But it has been held admissible. *State v. Gedicke*, 43 N. J. L. 86; *Kent v. Town of Lincoln*, 32 Vt. 591; *Matteson v. N. Y. Cent. R. Co.*, *supra*.

The case of *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537; s. c., 31 Am. Rep. 321, may be said to be in a measure opposed to the admission in evidence of statements made to any other than an attending physician when such statements are made after suit commenced. The case is however not opposed to the conclusion at which we have arrived on the facts in this case. Whether we should feel disposed to follow it to the full extent to which some of the reasoning of the learned judge who delivered the opinion might lead, we need not now determine.

[Other matters omitted.]

Judgment affirmed.

GLIDDEN V. HENRY.

(104 Ind. 273.)

Negotiable instrument — uncertainty of time of payment.

A note providing that "the payee or his assigns may extend the time of payment from time to time indefinitely, as he or they may see fit," is not negotiable.

ACTION on a note. The opinion states the case. The plaintiff had judgment below.

J. H. Mellett and E. H. Bundy, for appellant.

J. M. Morris, for appellee.

ZOLLARS, J. For value and before maturity, appellee became the owner of two promissory notes, executed by appellant, one of which is as follows:

"\$750.

NEWCASTLE, IND., April 14, 1883.

"Twelve months after date we, or either of us, promise to pay to the order of George W. Nugen, Jr., seven hundred and fifty dollars, with interest at the rate of seven per cent per annum after

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date until paid, and attorney fees, value received, without any relief whatever from valuation or appraisement laws, with eight per cent interest from maturity. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note; and further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely, as he or they may see fit, and receive interest in advance or otherwise from the maker or indorsers, for any extension or forbearance so made. Negotiable and payable at the Citizen's State Bank of Newcastle.

"J. W. GLIDDEN."

So far as is material here, the other note is the same. Appellee brought this action to recover the amount of the notes, and to foreclose the mortgage given by appellant to secure them.

The questions for decision are presented by the ruling of the court below in sustaining a demurrer to appellant's answers, and the assignment here that that ruling was erroneous.

If the notes are negotiable as inland bills of exchange, the demurrer was properly sustained, because the defenses set up in the answers are such as cannot be made as against the *bona fide* holder of such paper. We are therefore met at the threshold with the question, are these notes negotiable as inland bills of exchange? In section 5506, R. S. 1881, it is provided that "Notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover, as in case of such bills."

This statute does not provide what shall constitute a promissory note. The term "note" is used, as it was then and still is defined by the authorities, and well understood under the law merchant in the commercial world. *Melton v. Gibson*, 97 Ind. 158.

The sole purpose of the section was to put a limitation upon section 5503, and provide for commercial paper that might circulate free from defenses in favor of the maker. This is accomplished by the provision, that if the note be payable at a bank in this State, it shall be negotiable as inland bills of exchange.

The note then, with the addition prescribed by the statute, must be such as would have been negotiable under the law merchant without any statutory provision. Are the notes in suit such as would have been thus negotiable? A standard author has said: "To learn what qualities are essential to a negotiable promissory note, we must

bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose, the first requisite, that indeed, which includes all the rest, is *certainty*. This means certainty, * * * Second, as to the person or persons who are to make this payment, and the order and conditions of their liability. * * * Fourth, as to the time when payment is to be made. * * * It will be seen that the law endeavors to enforce, define, and protect all these certainties as far as possible." 1 Pars. Notes and Bills, 30. See also 1 Dan. Neg. Inst., § 41. This same general doctrine of the books is recognized by this and all other courts. *Walker v. Woollen*, 54 Ind. 164; s. o., 23 Am. Rep. 639. In this case it was said: "A note, in order that it be negotiable in accordance with the law merchant, must be payable unconditionally and at all events, at some fixed period of time, or upon some event which must inevitably happen."

Were it necessary, we might cite numerous decisions by this court asserting the general doctrine of certainty as necessary to a promissory note under the law merchant. The difficulty is not as to the general doctrine, but the application of it to each case as it arises.

In the case before us, all parts of the note must be looked to in determining the quality of the paper. There is a promise to pay in twelve months, but that promise is not certain and unconditional. The other clause is, that the time of payment may be extended indefinitely, as the parties may agree. From an inspection of the note, it is impossible to tell when it may mature because it is impossible to know what extension may have been, or may hereafter be, agreed upon. No definite time is fixed, nor is the maturity of the note dependent upon an event that must inevitably happen. The condition is not that something may happen, or be done, that will mature the note before the time named, thus leaving that time as fixed and certain, if the thing do not happen, or be not done; but the condition is that the time may be displaced by another, uncertain and indefinite time, as the parties may agree.

This distinguishes the case from some of the cases cited by appellee, which hold that so long as a definite time of payment, as fixed in the note, remains fixed and certain, the note retains its negotiability, although by certain agreed conditions it may be matured before that time. The case here is also distinguishable from another class of cases which hold that the time of payment

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may be dependent upon an event that must inevitably happen, such as the death of the maker, the coming of the seasons, etc. The precise question involved here has been passed upon by the Supreme Courts of Iowa and Michigan, and in each case it was held that the condition destroyed the negotiability of the note.

Woodbury v. Roberts, 59 Iowa, 348; s. c., 44 Am. Rep. 685; *Smith v. Van Blarcom*, 45 Mich. 371. See also as in point, *Cook v. Satterlee*, 6 Cow. 108; s. c., 16 Am. Dec. 432; *Gillilan v. Myers*, 31 Ill. 525; *Costelo v. Crowell*, 127 Mass. 293; s. c., 84 Am. Rep. 367.

We conclude from the foregoing that the notes in suit are not negotiable under the statute as inland bills of exchange, and that therefore whatever defenses appellant might have set up and made available as against Nugen, the payee, he may set up and make available as against appellee.

[Omitting other matters.]

The judgment is reversed with costs.

Judgment reversed.

**LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY V.
FOSTER.**

(104 Ind. 203.)

Carrier — passenger — baggage accepted before purchase of ticket.

A railway company whose baggageman accepts baggage from an intending passenger before his purchase of a ticket, contrary to the rule of the company, is liable for its loss without regard to that fact.

ACTION for the value of a lost trunk and contents. The opinion states the point.

A. Pond and O. G. Getsendanner, for appellant.

H. C. Dodge, for appellee.

ZOLLARS, J. Appellee brought this action to recover the value of a trunk and its contents.

[Omitting evidence.]

Appellant demurred to the evidence. The court overruled the demurrer, and rendered judgment for appellee. Appellant prose-

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cutes this appeal and insists upon a reversal of the judgment upon the grounds:

First. There is no evidence that the trunk was ever delivered to or received by the appellant or its agent.

Second. There is no evidence that the appellant's agent had any authority to receive the trunk in the absence of the appellee, and in advance of the time when she proposed to become a passenger on its train.

Third. The evidence introduced by the appellee shows affirmatively that the appellant's agent had no authority to receive the trunk in the manner it was received by him.

There is no reason why railway companies may not receive baggage in advance of the train upon which it is to be transported, and in advance of the purchase of a ticket or the payment of a fare by the owner, and thus become liable for its loss. They undoubtedly have the right to make reasonable rules and regulations, and a rule that a person intending to become a passenger shall purchase a ticket or pay fare before the company receives and becomes responsible for his baggage, is undoubtedly a reasonable regulation, as such a regulation secures good faith and fair dealing. But if the company adopts no such rule, or if having adopted, it adopts a practice or custom to the contrary, or if notwithstanding such a rule, it receives a person's trunk as baggage, trusting to his honesty to purchase a ticket or passage upon the train upon which the trunk is to go, it will be liable for its loss, whether that loss occurs before or after the arrival and departure of the train, or before or after the purchase of a ticket or payment of fare.

In the case of *Greene v. Milwaukee, etc., R. Co.*, 41 Iowa, 410, the facts were these: The plaintiff, for two and one-half years, had been teaching school in Decorah, Iowa. She spent her summers at Boscobel, Wisconsin, whither she was in the habit of going three times a year. On the afternoon of August 30, 1870, she talked with the company's agent at Boscobel about going back to Decorah, and informed him that her trunk would be sent to the depot that afternoon to take the early morning train west. In the evening of the same day plaintiff sent her trunk to defendant's depot, labeled with her name printed on a card, and Decorah, Iowa, written below it, as she had been in the habit of doing three times a year during the previous two and one-half years. The agent was not present when the trunk was left at the depot, but the trunk was afterward locked.

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up in defendant's baggage-room. Passengers frequently thus sent their trunks thus marked. The agent at Boscobel had always refused to sell plaintiff a ticket, or to check her trunk to Decorah, and she had been in the habit of paying her fare and getting her check upon the train. On the night the trunk was thus put in the baggage-room the depot was burned, and plaintiff's trunk was not afterward seen. The next morning she went to the depot for the purpose of taking passage to Decorah, but abandoned the intention because of the loss of her trunk. The railroad company requested the trial court to instruct, that it is not enough to make the company liable, that the baggage was received by the company, but that it must be received under a contract to carry both the passenger and his baggage, and that this contract, to be binding, must be mutual and bind both parties; that if the plaintiff placed herself under no obligation to become a passenger, but only expressed an intention to become a passenger at a future time, and if under the intention of the parties the plaintiff could rightfully withdraw her trunk at any time without taking passage, then defendant's possession of the trunk during the night was not that of a common carrier, and the plaintiff could not recover. A further instruction was asked, that the obligation to carry the baggage cannot be separated from the obligation to carry the person; that if the plaintiff left the trunk in question with the agent the night before the morning on which she intended to take the train, and paid no fare, but simply expressed an intention to take the train the next morning, she did not by so doing become a passenger, and was under no obligation to become a passenger at all, and the defendant's obligation to take care of a passenger's baggage did not arise unless she afterward became a passenger. In speaking of these instructions the Supreme Court said: "These instructions, though plausible, are unsound. They both recognize the doctrine that a railroad company assumes no duties as a common carrier respecting the baggage of one, so long as he may withdraw his baggage and conclude not to take passage. A person may be entitled to be protected as a passenger without purchasing a ticket or entering a car. *Allender v. C., R. I. & P. R. Co.*, 37 Iowa, 264 (270). Yet it cannot be doubted that before doing these acts, he might abandon his intention of taking actual passage. If a person can demand protection to himself as a passenger, he may also require that his baggage be cared for as the baggage of a passenger. Suppose a party at a railway station places his baggage

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in possession of the baggage-master and procures a check, and proceeds to purchase a ticket, but before he makes the purchase his baggage is stolen, in consequence of which he is compelled to forego the journey, and determines not to buy a ticket, may he not recover on account of the loss of his baggage? * * * The true question is not what the party might do, without the incurring of legal liability, but what, in view of all the circumstances disclosed, did he intend to do?" It was held that there was an acceptance of the trunk as baggage and that the railway company was liable for its loss, although the plaintiff had not purchased a ticket nor paid for her carriage. See same case, *Greene v. Milwaukee, etc., R. Co.*, 38 Iowa, 100.

In the case of *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, the facts were these: The plaintiff took his trunk to the station at 11 A. M., and requested that it might be checked for the next train, which started at 3 P. M. for Bridgeport. He was informed that it was not the custom to check baggage until about fifteen minutes before the time when the train should leave, whereupon he left his trunk in the care of the agent of the company in the baggage-room of the station. At the customary time it was checked for him and put on the cars for Bridgeport, and he went on the same train. When he received the trunk again it had been rifled of its contents, but whether before or after it was checked was not known. The company claimed, and asked the court to charge, that if the trunk was rifled after it was left at the station, and before it was checked, there could be no recovery. It was held that the railroad company was to be regarded as receiving the trunk for transportation when first delivered, and not for storage, and that its liability commenced as soon as it was delivered and received by the agent. The court said: "The reasonable convenience of travellers requires that they have an opportunity to deliver baggage at any reasonable time before the departure of the train, and it is therefore the duty of a railroad company to keep an agent at all important stations to receive and take charge of baggage. * * * It (the check) is not the contract, but evidence of the ownership, delivery and identity of the baggage. It is the delivery and acceptance, the abandonment of all care of the baggage by the passenger, and the assumption of it by the agents of the carriers, expressly or impliedly for the purpose of transportation, which fix the liability of the latter as such, and that liability begins when the baggage is delivered to the agent of

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the company for carriage." There is no evidence that the owner of the trunk had a ticket when he left it with the agent.

In the case of *Camden, etc., R. Co. v. Belknap*, 21 Wend. 354, the facts sufficiently appear in the opinion, by BRONSON, J. He said: "The facts which remain * * * are, that the defendants were common carriers between New York and Philadelphia, and that they carried passengers and their baggage, as well as merchandise. In conducting this business the defendants, either for profit or convenience, or both, kept two offices in the city of New York; in one of which (at No. 12 Washington street) they were in the habit of receiving, and if requested, locking up the baggage of persons intending to take passage in the next boat that should depart. The plaintiff, intending to proceed on his journey by the next boat, delivered his baggage at this office, where it was received by Bliven, the defendants' servant or agent, with full knowledge of the purpose for which it was delivered. Now, I think it quite clear, upon this statement, that the plaintiff's trunks were in the possession of the defendants as common carriers, and that they were answerable in that character for the safe-keeping of the property." The trunk was lost before the departure of the next boat, and the owner went by another route. He was allowed to recover the value of the trunk and contents. It is not definitely stated, but it is apparent, that he had not purchased a ticket or paid fare.

In the case of *Rogers v. Long Island R. Co.*, 1 Thomp. & C. (N. Y. Supr.) 396, the facts were, that the plaintiff sent his trunk to defendant's depot by an expressman. The trunk had a card fastened on it, marked with plaintiff's name and the place of his destination. The expressman placed the trunk by the side of a baggage crate, situated opposite a window in the ticket office, through which it might be seen. He informed the agent of defendant in charge of the depot where the trunk was, and such agent replied, "All right," and told two men who were in the depot to take care of it, whereupon the expressman left the depot. The plaintiff arrived later in the day, and purchased a ticket for Riverhead, and upon applying for a check for his baggage, the trunk could not be found. The Circuit judge charged the jury that if they credited the witness who testified to these facts, the defendant became responsible for the safe delivery of the property. The Supreme Court said: "We think this (charge) was correct. It is not easy to see what further act could be required of the

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plaintiff in order to make the delivery complete. No further act of his could put the property more fully within defendant's control." This decision was affirmed by the Court of Appeals. *Rogers v. Long Island R. Co.*, 56 N. Y. 620. Here again it is apparent that the owner of the trunk had not purchased a ticket or paid fare when the trunk was received by the carrier. See also *Bankier v. Wilson*, 5 Low. Can. 203.

It has been frequently held that under certain circumstances a person may be entitled to the rights and protection of a passenger, although he has not purchased a ticket or paid fare, and although there is no consummated contract of carriage. These cases turn upon the question as to whether or not the person in good faith intended to become a passenger. *Thomp. Carr. of Pass.* 42; *Allender v. Chicago, etc., R. Co.*, 37 Iowa, 264; *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306; *Gordon v. Grand Street, etc., R. Co.*, 40 Barb. 546; *Brien v. Bennett*, 8 Car. & P. 724. If a person thus intending to become a passenger may be entitled to the rights and protection of a passenger as to his person, there is no reason why a person thus intending to become a passenger may not hold the carrier for the loss of his baggage.

We cannot regard the case of *Ford v. Mitchell*, 21 Ind. 54, cited by appellant's counsel, as controlling here, because in that case the box was not delivered to any one held out as the proper person to receive such freight.

The case of *Grosvenor v. N. Y. Cent. R. Co.*, 39 N. Y. 34, also cited by appellant's counsel, turned upon the proposition that the property for shipments was not delivered at the proper place, and that the owner carelessly left it in a dangerous position; and further that it was not therefore delivered to the carrier.

Without extending this opinion to express our approval or disapproval of the reasoning in the case upon the question of delivery, it is sufficient to say that in the case before us, the trunk was delivered upon the platform, near the door of the baggage-room, which was certainly a proper place to deliver baggage to the baggageman. The case of *Mattison v. N. Y. Cent. R. Co.*, 57 N. Y. 552, cited by appellant's counsel, was decided upon this state of facts: Upon arrival of the passenger and her baggage at the place of destination, she informed the baggage-master at the station that she desired to leave her trunk for a few days, perhaps for two weeks. The baggage-master replied, that he was not allowed

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to and could not keep the baggage with the check on; that if she gave up the check the baggage would be perfectly safe. This she did, and the trunk was left. About a week after it was thus left, the trunk was delivered to one falsely claiming authority to receive it. It was held (DWIGHT and EARL, CC., dissenting), that the declaration of the agent was in substance, a notification to the plaintiff that he was without power to continue in force the obligation of the company in respect to the baggage indicated by the check, and the surrender of the check was in effect an admission of the performance of that obligation, that is, of the safe arrival and the delivery of the baggage. The decision was based upon the proposition that the surrender of the check under the circumstances was an admission by the plaintiff not only of the safe arrival, but also of the delivery of the baggage to her, and that she was bound to know that the agent could not make storage contracts after the performance of the contract of carriage. The conclusion was combatted in the opinion by the dissenting judges.

It might suffice to say of this case, that the facts are unlike the facts in the case before us. There it was a question of fact as to whether or not the owner had received her trunk from the carrier; here it is a question whether there is evidence which tends to show, or from which it may be reasonably inferred, that the carrier received the baggage from the owner. Here the agent was held out as having general authority to receive the baggage of persons intending to go upon the company's trains; there it cannot be said that baggage-masters are held out as having general authority to make contracts of storage, after the completion and performance of the contract of carriage.

We are cited to the case of *Wright v. Caldwell*, 3 Mich. 51. In that case the owner of the trunk placed it upon a steamboat, but he did not deliver it to any one, nor call the attention of any one connected with the boat to the fact that he had placed the trunk upon the boat for carriage or for any other purpose. That case is different in many features from the case in hearing.

Steamboats carry both freight and passengers. When a trunk therefore is placed upon a steamboat by the owner, it may be as freight or as baggage, according to circumstances. If not delivered and accepted as baggage, and the owner should allow the boat to depart without becoming a passenger, it is clear that he could not recover, as for lost baggage. But if a person delivers a trunk to a

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baggage man of a railway company, and it is received, it is difficult to see how it could reasonably be said that it is received as freight. The baggage man is held out as having authority to receive baggage, but he is not held out as having authority to receive freight. The public know that he has authority to receive baggage, and they are bound to know that he has not authority to receive freight, unless indeed he acts as both baggage man and freight agent. When therefore a trunk is delivered to an agent of a railway company who is a baggage man only, and he receives it, the presumption is that it is delivered and received as baggage.

The cases already cited by us show that a railway company may receive a trunk as baggage, and become liable for its loss as such before transit upon the express or implied understanding that the owner is to become a passenger, although he has neither purchased a ticket nor paid fare. In such a case the express or implied agreement to become a passenger makes the owner in such a sense a passenger, as to make the railway company liable for the loss of his baggage up to the time when the train leaves, and it is ascertained that the owner has not kept his agreement by becoming a passenger. If the railway company is willing to receive a trunk as baggage and assumed the responsibility of holding it as such upon the express or implied agreement of the owner to become a passenger, there is nothing to prevent it so doing.

In the case before us, the evidence tends to show that the trunk was so received; and the evidence is clear that appellee kept her agreement by purchasing a ticket for passage upon the train upon which she informed appellant the trunk was to go.

We have thus spoken of what the company may do. In the case before us, whatever was done in behalf of the company was by a subordinate agent, and the further contention of appellant is, that appellee's evidence shows that the agent had no authority to accept or receive baggage in advance of the train upon which it was to go, and in advance of the purchase of a ticket or the payment of fare by the owner. In other words, that the agent had no authority to receive the trunk until after a consummated contract of carriage by the payment of fare had been entered into between the owner of the trunk and the railway company. Appellee's evidence does show that the authority of the baggage man was thus limited by the rules and regulations of the company. Whether or not the filing of the demurrer to the evidence withdrew all of this evidence is a

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question which for the present we do not decide, but treat the case as though that evidence were to be considered.

There is no evidence at all showing, or tending to show, that appellee had any knowledge or notice of the rules and regulations limiting the authority of the agent, or fixing the manner or time of receiving baggage by him. Her baggage having been received upon a former occasion, under like circumstances, might well have led her to believe that the company thus received baggage in advance of the train, and in advance of the purchase of a ticket or the payment of fare. And she might well have been confirmed in this belief by the fact that upon this occasion the agent received the baggage without in any way giving notice or intimating that his authority was limited, as now contended. The course of the agent upon this occasion, as well as upon the former, was well calculated to prevent any inquiry by appellee as to any rules or regulations.

Nor is there any evidence that the public generally had any notice of the rules and regulations so limiting the authority of the agent. Appellee, we must presume, acted in good faith, with no notice of such rules and regulations. Having found this, and that her trunk was delivered to and received by the agent as baggage, the question is, must appellee, who is without wrong, lose the value of her trunk and its contents because the railway company had placed a limit upon the authority of its agent? That she must thus lose, we think is a proposition not supported either by reason or authority.

The baggageman was the agent of appellant, with general authority to receive the baggage of persons intending to go upon the company's trains. He was so held out to the public. That was the general scope of his business, authority and agency. Whatever he did within the general scope of this agency was binding upon the company, unless the owner of the baggage, in some way, had notice of a limitation imposed upon his general authority.

Mr. Wood, in his work on Railway Law, vol. 1, p. 447, citing authorities in support of this text, says: "Strangers dealing with the agent of a corporation are not bound to inquire what the corporation has in fact authorized him to do, but may deal with him in reference to those powers which it has held him out to the world as being possessed of, in other words, in reference to his apparent authority. * * * The maxim *qui facit per alium*,

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facit per se applies with full force to corporations; and the rule is not a doubtful one, either in policy or principle, that in transactions where one of two persons must sustain a loss, the loss must fall upon him who has made it possible for the other, innocently, to be placed in a position where loss might result to him except for the application of this rule. It would be disastrous to commercial as well as other interests, if a person by acting through the agency of another, could shield himself from liability for such person's acts *ad libitum*. Fortunately no such rule exists, and he who intrusts authority to another, in whatever department of business, is bound by all that is done by his agent within the scope of his apparent power, and cannot screen himself from the consequences thereof upon the ground that no authority in fact was given him to do the particular act, unless the act was clearly in excess of his apparent authority, or was done under such circumstances as to put the person dealing with him upon inquiry as to his real authority.

* * * The rule may be said to be, that restrictions upon an agent's apparent authority are not binding upon third persons, where there is nothing to put them upon inquiry as to the extent of his actual authority. The question is not what the powers of the agent in fact were; but what power did the company hold him out as possessing? From the business with which the agent was intrusted, had the person dealing with him a right to understand that he had the authority to do the particular act, in reference to which the principal denies his authority?" And again at page 425 of the same volume the author says: "So station agents are presumed to have power to make contracts for their railroads for the transportation of freight. The limitations on their powers they cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them."

These are familiar principles and supported by authority everywhere. *Evansville, etc., R. Co., v. McKee*, 99 Ind. 519; s. c., 50 Am. Rep. 102; *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391; s. c., 49 Am. Rep. 770; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; s. c., 10 Am. Rep. 566; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Farmers, etc., Ins. Co. v. Chestnut*, 50 Ill. 111; *Hutchinson Carriers*, §§ 267-9; *Heenrich v. Pullman, etc., Co.*, 18 C. L. J. 293.

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The facts in the case of *Armour v. Michigan Central R. Co.*, 65 N. Y. 111; s. c. 22 Am. Rep. 603, are these: M. got from the company's agent two bills of lading for a quantity of lard, consigned to the plaintiffs at New York. These bills recited the receipt of the lard by the company. M. made drafts upon the plaintiffs for \$7,200, and attached thereto the bills of lading. Upon the faith of these bills, plaintiffs made the drafts. The fact was that the railway company's agent issued these bills before the receipt of the lard, and it never was received by the company. The company defended on the ground that the authority of Street, its agent, was confined to bills of goods actually within its control, and that as the lard had not been delivered when the bills of lading were issued by him, he exceeded his authority, and the company was not liable to the plaintiffs who had paid the drafts upon the faith of the bills.

In answer to this argument the court, amongst other things said: "Street, having power to issue bills direct to consignees for goods actually in the possession of the defendant, and the present bills being in no ways distinguishable in form from those which were usually employed, he must be considered as having the necessary authority as to the plaintiffs acting in good faith."

A case involving a state of facts almost identically the same as involved in the case last above, has recently been decided by the Supreme Court of Pennsylvania. *Brooke v. New York, etc., R. Co.*,* citing and approving *Armour v. Michigan Cent. R. Co.*, *supra*. The court said: "It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein, has actually been given by the railroad company to Weiss (agent), it was not in any manner responsible for his unauthorized act, even as to innocent third parties who were misled and injured thereby. We cannot assent to this proposition. As between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested, but as between the principal and the agent, the true limit is the express authority or instruction given to the agent. *Evans Agency*, 594, 606; *Adams Ex. Co. v. Schlesinger*, 75 Penn. St. 246. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions, and this is especially the case with officers and

* 53 Am. Rep. 453.—REP.

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agents of corporations. Since a corporation acts only through agents it is bound by its agent's contracts when made ostensibly within the range of their office." *

The decisions in the two cases last above were made to turn to some extent upon the doctrine of estoppel; that where one of two persons must suffer by the wrong of a third, he shall lose who puts the third person in a position to commit the wrong. That doctrine may well be applied to the case before us. Appellant's agent had general authority to receive the baggage of persons intending to go upon its trains. It is claimed that the company had put a limit upon his authority, as to the time and manner of receiving such baggage. This limitation was not known to appellee, nor was any thing to put her upon inquiry; on the contrary, the course of the agent was such as to prevent inquiry.

Acting within the general scope of his employment, the agent received the trunk as baggage, and then abandoned all care of it, and left it upon the platform. If he had declined to receive the trunk, it would not have been lost. By his wrong it was lost. Appellant placed him in a position, and clothed him with apparent authority, to receive the trunk as he did. Appellee having relied upon his apparent authority, and having upon this reliance placed her trunk in his possession, the railway company cannot now, to escape liability, be heard to say that in receiving the trunk the agent exceeded his real authority.

Of course railroad companies do not give out that their baggage-rooms are store-houses, and hence the public have no right to assume that they are such. Persons would have no right to send their baggage to such baggage-rooms to be kept in store, or to be kept for an unreasonable time as baggage awaiting trains. The time prior to a train therefore must be a reasonable time. If the time should be unreasonable, that of itself might be sufficient to put persons upon inquiry even though the baggage should be received by the agent. The time in this case, from 9:30 at night until the 4:25 morning train, was not unreasonable, nor of itself sufficient to put appellee upon inquiry as to the authority of the agent to receive the baggage.

In support of the contention that appellee was bound to know of the rules and regulations limiting the manner and time of the

* But see *contra*, *Black v. Wilmington, etc., R. Co.*, 92 N. C. 42; s. c., 58 Am. Rep. 440. —REP.

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receipt of baggage by the agent, appellant's counsel cite the cases of *Eaton v. Delaware, etc., R. Co.*, 57 N. Y. 382; s. c., 15 Am. Rep. 513; *Cleveland, etc., Ry. Co. v. Bartram*, 11 Ohio St. 457, and *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275. These cases assert the familiar doctrine that all persons are bound to know that freight trains are for the carrying of freight, and passenger trains for the carrying of passengers, and hence must also take notice of the rules and regulations of railway companies, by and under which freight may be sent upon passenger trains, or passengers may go upon freight trains. The fact that there are freight and passenger trains is notice to the public that the carrier has made a division of its business. Persons are therefore bound to know that they cannot, as a matter of right, travel upon freight trains; that if allowed upon them at all, it must be by special leave and as a special favor, or under such rules and regulations as the railway companies may have adopted. They are bound to know these things because the division of the carrier's business puts them upon inquiry.

In the case of *Ohio, etc., Ry. Co. v. Hatton*, 60 Ind. 12, cited by appellant's counsel, it was held that it is the duty of persons, before taking passage upon trains, to ascertain whether or not, under the running regulations of the company, they will stop at the stations to which such persons may wish to go.

It is notorious that in the rapid transportation of through passengers all trains do not stop at every station. They are not held out as so stopping. And hence it is that persons are put upon inquiry, and must ascertain whether or not any particular train stops at their particular station. This is a different case from that of clothing an agent with apparent general authority, and imposing secret limitations with nothing to put persons upon inquiry.

We have extended this opinion somewhat on account of the importance of the questions involved, and the earnestness and ability with which those questions have been discussed by counsel. After this extended and careful examination, we are clear in our opinion that the judgment should be affirmed. It is therefore affirmed with costs.

Judgment affirmed.

MITCHELL, J., did not participate in the decision of this case.

Washburn v. Board of Commissioners of Shelby County.

WASHBURN V. BOARD OF COMMISSIONERS OF SHELBY COUNTY.

(104 Ind. 321)

Office and officer — township trustee — authority to employ physician

Where a county physician refuses to treat a person in urgent need of medical attendance, a township trustee has authority to employ another, and his declarations concerning payment are competent.

ACTION for services. The opinion states the case. The defendant had judgment below.

T. B. Adams and L. T. Michener, for appellant.

E. K. Adams and L. J. Hackney, for appellee.

ELLIOTT, J. In the fall of 1882, Benjamin C. Allen, a poor person, had his hand so seriously injured in a saw-mill as to make it necessary to amputate it. The appellant was a physician, living at Waldron, Liberty township, Shelby county, and while at supper he was called to attend to Allen, whom he found sitting on the step of his office waiting for him. The messenger who had called the appellant asked the latter if he did not need assistance, and receiving an affirmative answer, he summoned Dr. McCain the physician employed by the county to attend the poor. Dr. McCain was asked to attend to the patient, but peremptorily refused for the reason that Dr. Washburn had been first called to the case. The township trustee was informed by Dr. Washburn that he had amputated Allen's hand, and the trustee said to him, that he had commenced the case and "must go ahead with it."

The appellant offered to prove what was said by the trustee concerning paying for the services rendered Allen, but the court excluded the evidence.

We do not think that the fact that the appellee demurred to the appellant's evidence precludes him from availing himself of a ruling excluding competent evidence. To hold that a party by demurring to evidence may render unavailing a ruling made against his adversary, excluding competent testimony, would work great injustice, for by so holding we should lay down a rule that would enable a defendant to secure erroneous rulings on the admission of evidence,

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and then by demurring to the evidence admitted, deprive the plaintiff of the benefit of the rulings excluding evidence, however erroneous they might be, and however great the injury done to him by such rulings. The case is not at all like that of the demurring party asking a review of rulings upon the admission and exclusion of evidence, for he, by his own act, submits the cause for decision upon the evidence received by the court, and thus impliedly waives all questions upon rulings made in the course of the trial, but his adversary does no affirmative act waiving rulings to which he has reserved proper and timely exceptions. If the rule were that the party compelled to join in the demurrer to the evidence waived all questions reserved upon rulings made in the course of the trial, then he would be completely at the mercy of his adversary and might be deprived, without any fault on his part of the evidence upon which his case depended. We hold that a defendant who demurs to the evidence cannot deprive the plaintiff of the right to make available questions upon rulings excluding evidence.

We think that the declarations of the township trustee ought to have been admitted. There was testimony tending to prove that the case was one of emergency, that the physician employed by the county had refused to treat the injured man, and in such a case the township trustee, who is by virtue of his office overseer of the poor, had authority to sanction the employment of another physician. We do not hold that in ordinary cases the township trustee has authority to call in any other physician than the one employed by the county. On the contrary our opinion is that in ordinary cases he has no authority to call any other than the physician engaged by the board of commissioners. Where however that physician refuses to act, and there is a case requiring immediate treatment, the township trustee may call another physician. We cannot believe that the law intended that a poor man or woman urgently in need of medical or surgical attention should be left to suffer in cases where the county physician refuses to render professional services. The authority to take measures to prevent, if possible, suffering and death, must be lodged in some local officer, for it certainly was never intended that the sufferer should wait until the board of commissioners could be called together and an order obtained authorizing the employment of a physician.

The decided cases support the views we have expressed. Thus in *Board, etc., v. Seaton*, 90 Ind. 158, it was held that the trustee

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might employ a physician in a case where the county physician lived so far distant from the sick person as to be unable to give the sick person the attention he required. It was held in *Conner v. Board, etc.*, 57 Ind. 15, that where the county physician abandoned his contract, the trustee might employ another physician. The decision in *Board, etc., v. Ritter*, 90 Ind. 362, affirms that there are cases in which the township trustee, as overseer of the poor, has authority to employ a physician although one had been previously employed by the county. The decision in *Board, etc., v. Boynton*, 30 Ind. 359, correctly states the general rule, that where a county physician has been employed, the township trustee cannot employ another, but that decision does not apply to a case where the county physician refuses to render service to a poor person needing immediate attention.

The trial court erred in not admitting in evidence the declarations of the township trustee, and the judgment is reversed, with instructions to grant the appellant a new trial

Judgment reversed.

 CINCINNATI, INDIANAPOLIS, AND CHICAGO RAILWAY COMPANY
v. GAINES.

(104 Ind. 322.)

Railroad — negligence — sounding whistle at overhead highway crossing.

It is not necessarily negligent in a railroad company to sound a locomotive whistle at a point where the railroad crosses a highway by a bridge overhead, although the crossing is known to be one of extraordinary danger, and the sounding of the whistle causes a horse to run away.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

J. R. Coffroth and T. A. Stuart, for appellant.

B. W. Langdon and T. F. Gaylord, for appellee.

* In *Penn. R. Co. v. Barnett*, 59 Penn. St. 259, where the highway crossed the railroad on a bridge, it was held to be negligent not to sound the whistle before reaching the bridge, and to sound it under the bridge.— REP.

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MITCHELL, J. This action was brought by John W. Gaines against the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, and another railway company, whose line the appellant was operating, to recover for injuries alleged to have been sustained by the plaintiff in consequence of the careless and negligent running of a train by the appellant, and in failing to observe the statutory obligation imposed on those operating locomotive engines on railways, in respect of the approach to highway crossings.

[Question of pleading omitted.]

Upon request the court found the facts specially, and stated its conclusions of law thereon. The manner in which the track crosses the highway, the cautionary signs provided, the speed at which trains usually run in crossing, and the situation and conformation of the grounds surrounding the crossing and approaches to it, are exhibited in detail in the findings.

It was found that the crossing was one that was much used by the passing teams and vehicles, was of extraordinary danger, that accidents had frequently happened there before within the defendant's knowledge, and that the usual statutory signals were not always sufficient warning to notify the public using the highway of the approach of trains. The railway track crossed the highway by an overhead bridge, fifteen feet above the highway, the passage way for teams underneath being a space about twelve feet in width.

Trains approaching from the west were not visible to persons on the highway coming from the north, except at a point about one hundred and eighty feet distant from the crossing, and not then until such trains reached a point not farther than forty feet from the bridge. The "whistling post" for trains approaching from the west was a fraction over thirteen hundred and thirty feet westerly from the crossing. On the 20th day of October, 1882, the plaintiff, with his two sons, was returning from the city of Lafayette to his home, seated in a farm wagon; which was drawn by a mule team, driven by one of the sons. The team approached the crossing from the north-east upon a slow trot, the wagon making considerable noise, the plaintiff being at the time engaged in conversation with a neighbor who had been invited to a seat in the wagon. The wind was blowing moderately from the south-west, and the weather was clear and pleasant. It was about 4 o'clock P. M. It is found that under ordinary conditions the sound of the whistle on an engine could be heard from a point over a half mile west of the crossing,

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and the ringing of the bell, the roar and noise of the train coming over the track, could be heard a quarter of a mile distant. At a point from one hundred and eighty to one hundred and eighty-five feet from the crossing the team was stopped for the space of a few seconds for the purpose of looking and listening for the train, the plaintiff knowing that it was about time for the arrival of the regular passenger train, which was three or four minutes late. The occupants of the wagon hearing no signal or other indication of an approaching engine and train, the driver by direction of the plaintiff, whipped the team into a brisk trot and passed to the railroad crossing at the rate of about six miles an hour. This is found by the court to have been a proper rate of speed under the circumstances. While the plaintiff was thus occupied, an engine with a passenger train attached was coming from the west, over the defendant's line, at the rate of about eighteen miles an hour. When the engine arrived at the whistling post the engineer gave one "long blast" from the whistle, lasting five or six seconds, the fireman at the same time ringing the bell, which was rung continuously until the crossing was passed. The team and the engine reached the crossing about the same time, and while the wagon was under the bridge, and the engine passing above, the whistle on the engine was sounded, the persons in charge of the engine being unable to see teams when so near as plaintiff was, and having no knowledge of the presence of the passing team below. It is found that the mules were frightened by the sound of the whistle, the noise and smoke of the train, and that this was the sole cause of their fright. They became unmanageable, ran away with the wagon, which was overturned and the plaintiff thrown upon the ground with such violence as to sustain grievous and permanent injury in his person. The extent, nature and severity of the injury are described. Concluding its finding of facts, the substance of which is above set out, the court makes an inference of fact as follows:

"And it is further found as an inference of fact that said plaintiff received and suffered said injuries without any fault or negligence on his part or on the part of his son who was driving said team at the time said injuries were received, and that the defendant, the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company was guilty of negligence in running its said engine and train of cars over said crossing over said highway, and thereby negligently frightened the team of the plaintiff and thereby caused the said injuries to the plaintiff."

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The conclusion of law stated as to the appellee is as follows: "And I further find that the defendant, the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, is liable upon the facts hereinbefore found, and therefore I find for the plaintiff, and against said defendant, the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, and assess the plaintiff's damages at eight thousand dollars."

The appellant excepted to the conclusions of law, upon the facts found, and upon this exception is presented the first question for consideration: Do the facts found justify the inference that the railway company was guilty of negligence? The case is in some respects different from that ordinarily presented in which the conduct of persons operating railway trains, and persons travelling over grade crossings on public highways are involved. Since the railway here concerned crossed over the highway on its own bridge, so as to present no obstruction against the use of the highway, those operating trains over it were required to observe precisely the same care in doing so in respect of travellers on the highway at the crossing that was required at other places of equal danger. The single exception to this was, that the statute imposed upon those operating trains the duty of giving timely warning of the approach of engines by specified signals. The signals having been duly made, so that no negligence was predicated upon a failure to comply with its duty in that regard, the conduct of the appellant, as it is exhibited in the special findings, must be considered in all respects the same as if the highway along which the plaintiff was proceeding had lain parallel with, and in such close proximity to the railway as to have presented a situation of extraordinary danger. Whether it was negligent or not must depend upon the conduct of those operating its train, considered with reference to the danger incident to the situation, and the facts of which they had or were bound to take notice.

The only substantive act upon which negligence is predicated is, that when the locomotive entered upon the bridge the whistle was sounded. It is not found that the sounding of the whistle was unnecessary or in any respect improper, and we must therefore presume there was lawful occasion for it. It is expressly found that those in control of the engine had no knowledge of the presence of the plaintiff or of his team, and the facts found show that in the situation in which they were, no reasonable diligence

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would have discovered them to the persons operating the train. It is also specifically found that the sole cause of the fright of the team was the sounding of the whistle and the noise and the smoke of the train.

That the appellant was in the exercise of a lawful right in crossing its train over the bridge is not disputed. That the entrance of the locomotive upon the bridge under which the plaintiff was passing was attended with noise and smoke, was of course unavoidable, and thus the rule which requires us, in the absence of a finding to the contrary, to indulge the presumption that the sounding of the whistle was from some cause a proper and necessary thing to be done, results in the conclusion that the team was frightened from causes that were unavoidable and conduct that was necessary and proper. Unless therefore it can be held, that because the place at which the whistle was sounded was one of extraordinary danger, the mere fact that it was sounded without regard to the occasion for so doing was negligence *per se*, the fact of negligence inferred by the learned judge who tried the cause would seem to be without support.

Upon well-settled principles and upon the authority of cases forming a class to which this is allied, we think an inference of negligence cannot be justified on the hypothesis stated. That the juncture of affairs at the point where the accident happened produced a situation of extraordinary danger was not blamable to the appellant; that there are such places is one of the necessary incidents to the existence and operation of railways; that such a place existed did not affect either the right of the railway to use its line in any lawful manner, or of the plaintiff to proceed along the highway. Each however was under the obligation so to use its own as not unnecessarily to interfere with the rights of the other. Courts take judicial knowledge of the fact that sounding the whistle is, under a variety of circumstances, a necessity. The statute requires it upon the approach of trains to all highways. It is a means of warning persons or animals off the track, and thus perhaps saving car loads of passengers from disaster. The danger to persons on an adjacent or intersecting highway must be known and imminent in order to excuse the giving of signals required by law, or which might be necessary to clear its track from trespassing animals, where there was a probability that they might by contact derail the train. On the other hand, if there was no occasion for blowing the whistle or making any other noise than that necessarily incident to the run-

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ning of its train at a place where it might reasonably be supposed that some one who could not be seen might be using a highway so situate as to make its use dangerous, sounding the whistle or making any other unnecessary noise might be the grossest negligence, and if a person on the highway was seen by those in charge of the engine, and the unnecessary sounding of the whistle might put him in peril, such conduct as that supposed might be little less than wanton and malicious. But upon the facts as found, we cannot know but that the engine was approaching another street crossing, and that the signal given was made in pursuance of the defendant's statutory duty, or it may have been necessary in order to clear the track of trespassing animals or to warn some one of the approach of the train. "The mere sounding of the whistle cannot be deemed negligence, although blown in close proximity to the highway, and even though there are horses in the immediate vicinity." *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; s. c., 40 Am. Rep. 230.

In a case involving the principles we are considering it was said: "It cannot be questioned that defendant's train was rightfully on its track, and that the blowing of a whistle, and the letting off of steam with its attendant noise, are not *per se* acts of negligence, or evidence of wrongful conduct." *Culp v. Atchison, etc., R. Co.*, 17 Kans. 475. If the servants of the defendant were guilty of no improper conduct while exercising a lawful right, the fact that the plaintiff's team took fright at the sound of the whistle, the noise and smoke of the train cannot make it liable. The liability, if any exists, must rest upon some heedless or unnecessary act which was likely to and did produce the fright of the team.

In the case of *Philadelphia, etc., R. Co. v. Stinger*, 78 Penn. St. 219, which is similar in many respects to the case under consideration, it is said, "the mere fact of whistling furnishes no presumption of negligence." So in the case of *Favor v. Boston, etc., R. Co.*, 114 Mass. 350; s. c., 19 Am. Rep. 364. Speaking of the obligation of railroad companies, under circumstances such as we are here considering, the court said: "It has the right to do lawful acts upon its own premises, and it is not responsible for injurious consequences that may arise from such acts, unless the acts are negligently and improperly done. If the defendants in this case had done some negligent act in the immediate vicinity of the highway, calculated to endanger the safety of travellers passing over it with horses, a very different question would have been presented."

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We may say in this case, since it was found that the place was one of extraordinary danger, at which accidents were known to have occurred before, if it had been found that the team was frightened by the unnecessary or improper sounding of the whistle, a very different question would have been presented.

The plaintiff relies on the case of *Hill v. Portland, etc., R. Co.*, 55 Me. 438. In that case the engineer was in a situation to see the plaintiff and his horse before he sounded the whistle. Being so situated he sounded the whistle twice, that being the usual signal for the train to start. The court held that the signals thus given, although customary, were unnecessary.

The case of the *Pennsylvania R. Co. v. Barnett*, 59 Penn. St. 259, which is also relied on, does not support the appellee's contention. The railway company, in that case, was held liable because it approached a dangerous crossing without giving any warning. This was held to be negligence.

The statement in the last paragraph that the railway company "was guilty of negligence in running said engine and train over said crossing over said highway, and thereby negligently frightened the team," adds no force to the finding of facts. This is but a conclusion, and must rest for its support on the facts found. *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186.

It results that upon the facts found by the court the inference that the defendant was negligent was not justified, and the conclusion of law should have been that the plaintiff was not guilty of negligence.

The judgment of the court is reversed with costs, with instructions to the court below to state conclusions of law on the facts found in accordance with this opinion, and to render judgment accordingly.

ON PETITION FOR A REHEARING.

[Omitting another point.] As respects the second proposition it is now contended, the special findings being silent upon the subject of the necessity or propriety of sounding the whistle when the engine came upon the bridge, which was in part the occasion of the fright of plaintiff's team, that the conclusion must be that it was unnecessarily and improperly sounded.

The action having been brought to recover damages for alleged negligence, it is of course not disputed that the burden of proving negligence was on the plaintiff. Nor is it claimed, as indeed upon

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reason and authority it could not be, that the mere sounding of the locomotive whistle is, ordinarily, negligence *per se*. The argument is, that because it is found that the whistle was sounded at a place of extraordinary danger, where teams were likely to be passing, and because the act of sounding it was likely to give fright to passing teams, therefore it must be presumed, from the mere finding that it was sounded, that it was wrongfully and negligently done.

At the former hearing we sought to maintain a proposition that because sounding the whistle was, under some circumstances, absolutely enjoined as a statutory requirement, and because the courts took the judicial knowledge of the fact that under other circumstances, it was an indispensable necessity to the running of trains, therefore the mere fact that the whistle was sounded was not of itself negligence. Unless it can be maintained that it was, the argument is at an end. If the act which the court finds contributed to the injury was not *per se* negligent, that is, was negligent or not, depending on whether there was a necessity for doing it, manifestly before an inference of negligence can arise from the mere doing of the act, it was incumbent on the party having the burden of the issue to show that the act was done under such circumstances as made it at that time negligent.

Where a special finding is silent as to a fact, the existence of which is necessary to make out the plaintiff's case, the presumption will be the fact did not exist. This rule has been so often stated that we need not cite authorities in its support. To sustain the plaintiff's case, it was incumbent on him to prove that the defendant was guilty of negligence. The proof, as we must assume, went to such an extent as to enable the court to find nothing more than that the defendant did that for which, under some circumstances, the law imposes a penalty against its servants if the act which was done is omitted, besides making the company liable for all damages which result from its omission. Under other circumstances the court knows judicially that an indispensable necessity may require the doing of the act; whether doing the act was negligent or not depended upon the presence or absence of the conditions which under pains and penalties required it to be done, or the existence of any of the numerous circumstances which may have rendered it of the highest public concern that it should have been done. Upon these subjects the evidence was such, we must assume, that the court was unable to find one way or the other. Now it is insisted

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that because the place was one of extraordinary danger and the act done was one which was likely to produce injury, the court must assume from the mere doing of the act that it was improperly and unnecessarily done.

This beyond question would be the rule in case sounding the whistle on the locomotive while in rapid motion was something which the engineer might always do or omit at his pleasure, without regard to time or place. The case would then be within the rule, that "where a person is doing a voluntary act, which he is under no obligation to do, he is held answerable for any injury which may happen to another, either by carelessness or accident."

Vincent v. Stinehour, 7 Vt. 62; s. c., 29 Am. Dec. 145; *Underwood v. Hewson*, Strange, 596. This principle distinguishes all the cases which the learned counsel have cited in support of their petition.

There is neither legal requirement nor other necessity that we know of, that live coals of fire should, under any circumstances, be dropped from an elevated railroad in such manner as that they may fall upon those passing beneath, along a public street, as was the case in *Lowery v. Manhattan R. Co.*, 99 N. Y. 158; s. c., 52 Am. Rep. 12. So with the blowing off of steam from an engine. The law fixes no time or place, when and where this is to be done, and courts can have no such knowledge of the necessity for so doing, that it can be said, as a matter of judicial knowledge, that the act must be done at the very moment an emergency arises, as in the case of blowing and sounding a whistle. The doing of such an act, without explanation, at a time when and place where there is a high degree of probability that it will produce hurt to others, may well be held to be negligence. The reason is, the person in charge of the engine presumptively might have selected another time and place for the act. Where however an act is done, in the progress of a business, which customarily is only performed in pursuance of a legal duty or public necessity, it will not be presumed, from the mere doing of the act, that it was unnecessarily or wrongfully done.

The distinction is precisely that which governs in a case where one who is under no obligation to do so, voluntarily handles a fire-arm in such manner that it is discharged to the hurt of another, and the case of a soldier who, while in exercise, hurts another by the discharge of his piece. In the one case, civil liability attaches regardless whether the injury occurred through carelessness or misfortune; in the other, only when the act was done wrongfully or carelessly.

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It is as much a requirement of the law that an engine shall be provided with a whistle, and that it shall be blown as occasion may require, as that a soldier shall carry a gun, and that he shall exercise when commanded, and for the same reason that the law will not presume negligence against the soldier when hurt results from the use of that which the law required him to use, it will not presume negligence against the railroad company because it used that which the law compelled it to use. The engineer may not, to any degree whatever, wait his convenience, or select the place at which the whistle is to be sounded. When certain points are reached, or the emergency arises, the duty is imperative at that moment. Public safety is in many ways involved in the prompt discharge of this duty. We cannot put the engineer under the pressure of a rule which shall hold him responsible for failing to sound the whistle on all proper occasions, and at the same time indulge a presumption against him and the railway company, when the whistle is sounded at a place of extraordinary danger, that it was wrongful and unnecessary.

It is no hardship to require of him who asserts that it was wrongful and unnecessary, to produce such a state of facts as will at least enable the court to find something beyond the mere fact that the whistle was sounded.

The petition for a rehearing is overruled.

ELMORE V. OVERTON.

(104 Ind. 548.)

Schools — superintendent — refusing license.

A county school superintendent, willfully or corruptly refusing a license to teach to one lawfully entitled, is liable in damages. (*See note, p. 847.*)

ACTION for refusing a license to teach. The opinion states the case. The defendant had judgment below.

E. C. Snyder and W. W. Thornton, for appellant.

T. E. Ballard, M. E. Clodfelter, M. D. White and W. S. Moffett, for appellee.

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NIBLACK, C. J. Action by James Elmore, a person occasionally engaged, and desirous of continuing, in the business of a common school teacher, against John G. Overton, formerly the superintendent of the common schools of Montgomery county, for damages for refusing while such superintendent, to issue to him a license, as such teacher, after he had by law become entitled to receive such a license.

The complaint was in four paragraphs; but a demurrer was sustained to the second paragraph, and in consequence it is not in the record.

The first paragraph charged, that notwithstanding the plaintiff had furnished satisfactory evidence of his good moral character, and had passed an examination which entitled him to a license as a teacher in the common schools for the period of twelve months, the defendant unlawfully and maliciously refused to grant and to issue to him a license as a teacher in such schools.

The third paragraph charged, that upon the plaintiff having furnished satisfactory evidence of good moral character, and having passed a successful examination, as alleged in the first paragraph, the defendant granted to him a license to teach in the common schools of Montgomery county, but that the defendant had thereafter, wickedly and corruptly, failed and refused to issue to him, the plaintiff, a certificate of the fact that a license as such teacher had been so granted to him.

The fourth paragraph was substantially the same as the third, with the additional averment that the defendant had given out and pretended, as a reason for not issuing a certificate of the fact that the plaintiff had been granted a license to teach in the common schools of the county, that he, the plaintiff, was not a man of good moral character, by means of which the plaintiff became greatly scandalized and injured in his business as a teacher in the common schools.

Issue, trial, verdict and judgment for the defendant.

Error is assigned upon the overruling of the plaintiff's motion for a new trial, and by the assignment of cross errors questions are made upon the sufficiency of the first, third and fourth paragraphs of the complaint.

It is well settled, and hence conceded, that a judicial officer is not civilly liable for an erroneous decision, however gross the error may have been, or however bad the motive was which inspired it.

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Such a liability would be inconsistent with the proper exercise of judicial functions. Besides other appropriate means are provided for relief against a false or erroneous judgment. *Larr v. State*, 45 Ind. 364; *Kress v. State*, 65 Ind. 106; *State v. Jackson*, 68 Ind. 58; *Halloran v. McCullough*, 68 Ind. 179; Cooley Torts, pp. 379, 403; *Stewart v. Cooley*, 23 Am. Rep. 690; *Busteed v. Parsons*, 25 Am. Rep. 638; *Rains v. Simpson*, 32 Am. Rep. 609; *Jones v. Brown*, 37 Am. Rep. 185; 2 Wait Act. and Def. 117.

It is claimed that a county superintendent of common schools, in passing upon the evidence offered in support of the moral character of an applicant for a license as a teacher, as well as in judging of his qualifications and fitness to become a teacher, acts either judicially, or to such an extent *quasi* judicially as to entitle him to the same immunity against a civil action for an erroneous or false judgment as that enjoyed by a judicial officer.

Section 4424, R. S. 1881, provides for the election of a county superintendent of common schools in each county. Section 4425 prescribes that "Said county superintendent shall examine all applicants for license as teachers of the common schools of the State, by a series of written or printed questions, requiring answers in writing, if he wishes so to do; and in addition to the said questions and answers in writing, questions may be asked and answered orally; and if from the ratio of correct answers and other evidences disclosed by the examination, the applicant is found to possess a knowledge which is sufficient in the estimation of the superintendent to enable said applicant to successfully teach, in the common schools of the State, orthography, reading, writing, arithmetic, geography, English grammar, physiology, and the history of the United States, and to govern such schools, said superintendent shall license said applicant for the term of six months, twelve months, eighteen months, or two years, according to the ratio of correct answers and other evidences of qualification given upon said examination, the standard of which shall be fixed by the superintendent. Applicants before being licensed, shall produce to the superintendent the proper trustee's certificate, or other satisfactory evidence of good moral character; provided, that after an applicant has received two licenses in succession, for two years, in the same county, the superintendent thereof, after the expiration of the last license issued, may renew the same without a re-examination at his discretion."

As we construe this section of the statute, it does not confer on the county superintendent either judicial or *quasi* judicial power in the matter of licensing persons to teach in the common schools; nor is such superintendent invested with any such power by any other provision of the statute having relation to the duties of his office. The office in question belongs to the executive department of the State, and the duties attached to it are, strictly speaking, of a merely administrative character, that is, are in aid of the execution of, and assist in giving force and effect to, other provisions of our common school system. Any attempt therefore to confer on such an officer any power essentially judicial would be in derogation of article 3 of the Constitution of our State, which prohibits an officer in the executive department from discharging any duty pertaining to either the legislative or judicial departments of the State government. But we regard the discretion conferred upon the county superintendent on the subject of licensing teachers as being so far analogous to a judicial discretion that he is protected from any claim for damages on account of any mere mistake in his decision or error in judgment, whether in granting or withholding a license to a person desirous of becoming a qualified teacher in the common schools. In that respect we think a county superintendent of schools occupies a similar and generally analogous position to that of an inspector of an election, who cannot be made responsible for a mere error of judgment in rejecting a ballot offered by a qualified voter, but who may be required to answer in damages for maliciously rejecting such a ballot. *Gates v. Neal*, 23 Pick. 308; *Jenkins v. Waldron*, 11 Johns. 114; s. c., 6 Am. Dec. 359; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Weckerly v. Geyer*, 11 S. & R. 35; *Rail v. Potts*, 8 Humph. 225; *State v. McDonald*, 4 Harr. 555.

After discussing and approving the doctrine that a judicial officer cannot be held pecuniarily responsible for an erroneous decision concerning any matter of which he has jurisdiction, however gross the error or bad the motive which led to it, Cooley, in his work on Torts, at page 411, says: "But it is an interesting and very important question, whether in the case of that class of officers who do not hold courts, but exercise what may be and often is called power *quasi* judicial, like assessors of lands for taxation, the immunity is not after all only partial and limited by good faith and honest purpose. There are certainly many cases which

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hold, and more which assume, that the law will hold such officers liable if they act maliciously to the prejudice of individuals. Thus it is said that the members of a school board may be held responsible for the dismissal of a teacher, if they act maliciously and without cause, and a county clerk, for willfully and maliciously approving an insufficient appeal bond, and a wharf-master, for the removal of a ship from a certain dock, where it can be shown that the order was given maliciously, and with the purpose to cause injury." In this connection it may be stated that where a public officer acts either from willful and wicked, or from corrupt motives, he is held to act maliciously. While therefore the non-liability of a county superintendent for a mere error in judgment in refusing to grant a license to an applicant who desires to become a teacher is fully conceded, we are of the opinion that he ought to be held liable for maliciously withholding a license from an applicant lawfully entitled to receive such a testimonial to his qualifications as a teacher in the common schools.

In coming to this conclusion, we feel that we are supported by the very decisive weight of authority in analogous cases, and are in harmony with the general scope and spirit of article 3 of the Constitution, which divides our State government into three separate and distinct departments. *Gregory v. State*, 94 Ind. 384; s. c., 48 Am. Rep. 162. Consequently the objections urged against the sufficiency of the several paragraphs of the complaint now before us cannot be sustained.

[Other points omitted.]

Judgment affirmed.

NOTE BY THE REPORTER.—The citation made by Judge Cooley, in *Torts*, 412, is incorrect. Instead of *Bennett v. Fulmer*, 49 Penn. St. 157, it should be *Burton v. Fulton*, 49 Penn. St. 151. The decision was that the action could not be maintained against the directors without explicit proof of malice, intent to injure, and unlawful conspiracy, and that malice could not be presumed from proof of the teacher's good conduct and capacity.

In *Gregory v. Small*, 89 Ohio St. 346, it was held that the directors were not personally liable in damages for dismissing a teacher on the ground that he had not been employed, if they acted honestly and in good faith. "They are personally liable only when they act with a corrupt intent."

To the same effect is *Morrison v. McFarland*, 51 Ind. 206. Here the directors dismissed the teacher before the expiration of the term for which they had hired her. "The mere violation of the contract" did not render them personally liable.

See to the same effect, *McCormick v. Burt*, 95 Ill. 263; s. c., 85 Am. Rep. 163; *Dritt v. Snodgrass*, 66 Mo. 286; s. c., 27 Am. Rep. 343.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

RODMAN V. MICHIGAN CENTRAL RAILROAD COMPANY.

(55 Mich. 57.)

Master and servant — unusual risk.

As to whether a brakeman can recover against his company for an injury received in consequence of the conductor's managing the locomotive in the engineer's absence, the court were equally divided. (See note, p. 858.)

ACTION for personal injuries. The head-note shows the point. The defendant had judgment below.

Conley, Maybury & Lucking, for appellant.

Henry Russel and Ashley Pond, for appellee.

COOLEY, C. J. The plaintiff, a brakeman on the road of defendant, brings suit for an injury received by him while coupling cars. The injury happened to him while in the discharge of his duties as brakeman, and under the general principle that the servant takes upon himself the risks incident to his employment, the defendant is not responsible unless his case is brought within some recognized exception to the principle.

To make out an exception, the plaintiff avers that at the time of the injury the engineer and fireman in charge of the locomotive of

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the train "temporarily left their respective posts for some purpose unknown to the plaintiff," and that the conductor, who was without competency for the purpose, undertook to take the place of the engineer, and ordered the plaintiff to make a coupling. It was while he was obeying this order, and while the conductor was managing the engine, and in consequence of the conductor's unskilfulness, that the plaintiff, as he avers, was injured. The order, it is said, was wrongful under the circumstances, and though the plaintiff, under the decision in *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, was excusable for obeying it, yet he did not, while obeying it, take upon himself the incidental risks; such risks not being within the contemplation of his employment.

The *Bayfield* case seems to us altogether different from this. There a common laborer on a railroad was ordered by his superior to perform the duties of a brakeman, and while doing so was injured. He was ordered into a different service to any in which he had ever engaged; and the order was plainly wrongful. But in this case the plaintiff was put to no new or different service, and the only complaint is that in the very service he agreed to perform he was exposed to a risk not properly belonging to it, and therefore not contemplated by his contract of service.

The risk was certainly unusual, and probably not in the minds of either party when the plaintiff was employed; but that fact would not of itself determine the responsibility. Accidental injuries are often, perhaps most generally, the results of unexpected causes; but if these causes arise in the course of a servant's employment, he must be deemed to have assumed their risks. And the only question there can be in this case is whether the plaintiff was ordered to do something which under the circumstances was outside of his employment, so that, had he been inclined to do so, he might rightfully have refused obedience to the order. And this, as it seems to us, must depend upon whether, when the contingency appears to the conductor to render it necessary, that official may for the occasion take charge of the engine, and at the same time require the brakeman to continue to perform his service.

That contingencies may and do arise in which the conductor should take charge of the engine for the time, is undoubted. The necessity may sometimes be as urgent as it is plain; and lives may depend upon it. This might happen from injury to the engineer, or sudden illness; and when to leave the train where the disability

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of the engineer occurs would endanger some other train. But there might be other reasons for the engineer leaving his post, for which the company would not be in fault, and the conductor, with the train in his charge and under obligation to avoid other trains, must act in the emergency as the necessities of the case shall require. His highest and plainest duty in some circumstances will be to take possession of the engine and operate it. And it cannot be possible that when such is his duty the brakeman may rightfully prevent its performance by refusing to remain at his post.

In this case the plaintiff says the engineer and fireman temporarily left their posts for some purpose unknown to the plaintiff. It is not charged that they did so with the company's consent, or that there was any wrong connected with their leaving for which the company was responsible. Suppose they had gone off on a strike; may other persons employed on the train refuse to assist in moving it out of the way of other trains? Surely this question must be answered in the negative.

If under any circumstances the conductor may rightfully take charge of the engine, this suit must fail, as there is no allegation in the declaration to show that in this case he was not justified. And he, being the person responsible for the safety and management of the train, must be allowed a certain discretion in deciding upon emergencies, and the presumptions must favor his action. And when he acts rightfully, it is contemplated in the employment of his subordinates that they, within their several spheres, shall assist him.

That there is nothing in the *Bayfield* case, which in the opinion of the judges who decided it conflicts with this view, is apparent from the case of *Greenwald v. M. H., & O. R. R. Co.*, 49 Mich. 197. In that case a fireman was ordered to perform an engineer's duty, and while doing so an injury occurred to a brakeman, for which suit was brought. The chief justice, speaking for the court, said the order "was a proper one beyond question;" and the case was disposed of on that assumption. But as respects the propriety and rightfulness of the order, that case stands upon exactly the same ground with this.

The case of *Houston, etc., R. Co. v. Myers*, 55 Tex. 110; s. c., 8 Am. & Eng. Ry. Cas. 114, is directly in point here. That case differs from this only in the fact that it was the fireman and not the conductor who was managing the engine, and who was alleged to

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be incompetent for the duties of the engineer. A brakeman, who was injured while the fireman was thus in charge, brought suit against the railroad company, but was held not entitled to recover. The judge of the Superior Court took the same view of the case, and we think his judgment should be affirmed.

The opinion of this court in *Detroit Savings Bank v. Zeigler*, 49 Mich. 157; s. c., 43 Am. Rep. 456, contains much respecting mutual assistance by subordinates in special cases, that applies with force to the case of servants in various capacities on a railroad train.

CAMPBELL, J., concurred.

CHAMPLIN, J. [Omitting statement.] It was implied as a part of the contract between the plaintiff and defendant that the trains upon which the plaintiff was employed to do the service required of a brakeman should be run and operated by an engineer possessed of the requisite skill and experience for the position, while he should be engaged in the performance of his duties; and while the train should be so run and operated he assumed all the risks incident to such employment, but he did not assume the risks incident to such employment should the engine be run and operated by a person without skill or experience, for this would be to put him in a situation of greatly increased peril and risk of personal safety in the performance of his duties.

In this case it is alleged in the declaration that the conductor was the agent of defendant, and had charge of the train and command of the other employees of defendant on the train, including the plaintiff. He was put therefore by the defendant in his place to discharge the duty which the defendant owed to the plaintiff, to see that the employees of the defendant were discharging the respective duties required of them, and in the discharge of this duty the conductor was not a co-servant but the representative of the defendant, who in that respect is bound by the act or omissions of the conductor the same as though such acts had been done or omitted by defendant personally. And the defendant having placed the conductor in a position of authority over the plaintiff and other servants, and made them subject to his direction and control, while the defendant is not chargeable for the consequences of directions given by such superior officer within the scope of the general employment, he is chargeable to plaintiff for an abuse of such authority

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as much as he would be to a stranger. Wood Mast. & Serv., §§ 438, 439, 450, and cases cited in notes.

Suppose the conductor had ordered a day laborer or an entire stranger to take the place of the engineer during his temporary absence, and through his negligence, carelessness and want of skill plaintiff had received the injury complained of without fault on his part, it would have constituted such an abuse of authority as to render the defendant liable. It was likewise an abuse of his authority in the conductor to order the brakeman to couple the cars in the absence of the engineer, while he himself being a person unfit, incompetent and lacking the requisite skill and experience, attempted to manage and operate the locomotive engine in making such coupling.

By the exercise of his authority the conductor ordered the plaintiff to perform services of increased peril not contemplated by his contract with defendant. The case is no different from what it would have been had the defendant been a natural person, and without possessing the requisite skill and experience and being wholly unfit and incompetent, had himself undertaken to run and manage the engine, and had at the same time ordered the plaintiff to couple the cars, and the injury had resulted in consequence of the want of fitness, competency, skill and experience of defendant. The defendant is equally liable for the acts of his agent, the conductor, as if they were his own, when such acts are an abuse of his authority, or where he stands in place of the defendant.

What was said in the *Bayfield* case is equally pertinent here, namely: "When one person engages in the employment of another, he undertakes to obey all lawful orders, and he subjects himself for any failure to do so to the double liability of being expelled from the employment and of being required to pay damages. It is true the master had no right to direct him to do any thing not contemplated in the employment, but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful, the giving of the orders being of itself an assumption that they are lawful; and the servant who refused to obey would take upon himself the burden of showing a lawful reason for the refusal." *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 210. The principles laid down in that case rule this. Both are based upon an abuse of authority; and as was said in that case, "it is in general no excuse to the employer

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that an injury which has occurred was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risk of such disobedience when he puts the servant into his business; and the reasons for holding him responsible for the servant's conduct are the same whether the injury results from a failure to observe the master's directions, or are from neglect of the ordinary precautions for which no specific directions are deemed necessary."

In the *Bayfield* case the excess or abuse of authority consisted in directing a common laborer to perform the duty of a brakeman, which was a more perilous duty than that for which the servant had contracted. In this case the abuse of authority consisted in the twofold act of ordering the plaintiff to couple cars in the absence of an engineer, and in attempting to run and manage the engine, being entirely unfit and incompetent to perform that duty, and the liability results from the combined act and order of the conductor.

The judgment should be reversed, the demurrer overruled, with leave to defendant to plead in twenty days from the time of notice of filing the remittitur, and the cause remitted to the court below for further proceedings.

Judgment affirmed.

SHERWOOD, J., concurred.

NOTE BY THE REPORTER.—See *Crispin v. Babbitt*, 81 N. Y. 516; s. c., 81 Am. Rep. 521; *Gormley v. Vulcan Iron Works*, 61 Mo. 492.

The doctrine of the principal case was held in *Quinn v. N. J. Lighterage Co.*, 23 Fed. Rep. 863, where the superior servant was a vice-principal discharging the duty of a co-employee of the plaintiff. WALLACE, J., said. "If the duty negligently performed is not the master's duty, but a servant's duty, the servant injured has no right to complain unless the employer selected was negligent in selecting the co-servant. * * * The true inquiry in this case is whether the character of the act of the captain was one which it was incumbent upon the defendant to see properly performed. * * * Where the captain of the barge was not performing a captain's duty while working at the tongs, but that of a common laborer, his negligence was not that of a vice-principal, but of a co-laborer. If he had directed any of the men assisting the plaintiff to do that particular part of the work which he undertook to do himself, as he might have done if he had seen fit, and the plaintiff had been injured by the fault of the one thus selected, the defendant would not have been liable, in the absence of proof that the captain had selected an incompetent man for the place. The plaintiff has no more ground of complaint than he would have had if he had been injured by the carelessness of any of his fellow servants."

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**LYON V. TRAVELLERS' INSURANCE COMPANY OF HARTFORD,
CONNECTICUT.**

(55 Mich. 141.)

Insurance — payment of premiums — forfeiture.

A railway brakeman, insured against accident, gave the insurers a written order on his company for the premiums as they fell due, which they delivered to the railroad company. That company neglected to pay one installment, and while it was in arrear the brakeman was killed by accident. *Held*, that the policy was not forfeited, and the beneficiary might recover, notwithstanding it provided that there could be no liability for an injury occurring while any premium was in arrear.

ACTION on a policy of insurance. The opinion states the case. The defendant had judgment below.

Spaulding & Barker, for appellant.

Wilkinson & Post, for appellee.

SHERWOOD, J. This is an action upon a policy of insurance issued by the defendant to Mark Lyon, March 3, 1883, insuring him for one year against bodily injuries received through external and accidental violence, and made payable, in case of accidental death, to his mother, the plaintiff. The policy was based upon a written application, and an order upon the Detroit, Grand Haven & Milwaukee Railroad Company, both executed by the insured and bearing even date with the policy. These three instruments taken together constitute the policy of insurance upon which the rights and obligations of the parties depend.

Mark Lyon, at the time the policy was issued, and thereafter until the time of his death, except when sick, from May seventeenth to August twentieth was in the employ of the above mentioned railway company. The premium upon said policy was \$27 for the year, and its payment was provided for by Lyon in the following order:

“PAYMASTER’S ORDER FOR \$27. No. 92,746.

To the Detroit, Grand Haven & Milwaukee Railroad Company: Please pay to the Travellers’ Insurance Company, of Hartford, Conn., or its authorized agent, the sum of twenty-seven dollars, by installments, as follows:

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“ First installment, 6.75 dollars to be paid and deducted from my wages for the month of March, 1883.

“ Second installment, 6.75 dollars to be paid and deducted from my wages for the month of April, 1883.

“ Third installment, 6.75 dollars to be paid and deducted from my wages for the month of May, 1883.

“ Fourth installment, 6.75 dollars to be paid and deducted from my wages for the month of June, 1883.

“ The first installment being the premium for two months, the first insurance period under a policy of insurance issued to me by said company, and bearing even date and number herewith; the second installment being the premium for two months, the second insurance period under said policy; the third installment being the premium for three months, the third insurance period under said policy; and the fourth installment being the premium for five months, the fourth insurance period under said policy,— all in accordance with the provisions and conditions of said policy, and my application for the same.

“ Occupation, brakeman mixed train.”

It was also stipulated by the policy that there should “ be no liability under this policy for any claim by reason of personal injuries, as aforesaid, occurring in either of the said insurance periods for which the respective installments of premium shall not have been actually paid.”

The defendant, after receiving the order, and soon after its date, deposited the same with the railway company, in accordance with a custom existing in such cases between them, and it was the practice of the defendant, early in each month, to send to the railway company a statement of the amount due from the employees of such company by reason of insurance, which the said railway company stopped against the pay of such employees about the middle of the month and paid it over to the defendant.

Mark Lyon had money due him from the railway company for wages in each of the months of March, April and May, in excess of the amount falling due on said order. The defendant rendered its statement of the amount due on the order to the railway company on the first of April, May, June, July and August, and the first two payments were made by the railway company to the defendant, being from the March and April wages of Mark Lyon. These sums paid for insurance to July third, at noon. The railway company did

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not pay the third installment from the May wages, though it had money in its hands, subject to said order, to the amount of \$23.42.

Mark Lyon was accidentally killed September 26th, seven days before the expiration of the third insurance period, while at work for the railway company on a freight and logging train as a brakeman. He had no wages due him for June, and was paid his May wages by the station agent at St. Johns, July 6th, according to his time kept by the railway company, three days after the commencement of the third insurance period. The defendant did not notify Mark Lyon of the non-payment of the third installment; did not cancel the policy nor return the order to him; but rendered statement of back premiums to the railway company in July and August, and at the time of his death the railway company owed Lyon for wages \$40.

One of the clauses of the contract contained in the application is to the effect that "for any injury received by exposure to accidents, risks or occupation classified as more hazardous than the occupation or hazards against which the insurance is taken, the insured shall be entitled to recover only such amount as the premium paid by the insured would purchase, at the rates fixed by the company for such increased hazard."

So far as the finding or record shows, the first information the plaintiff received after the death of the insured, that the insurance company claimed that they were not liable under the policy, was on the sixth day of October, when she wrote Mr. Thompson, the State agent at Detroit, asking what proofs of death would be required, and was informed by letter that the policy was not in force at the time of the death of the insured, because of the non-payment of the premium.

The foregoing is the substance of the facts as they are found by the court and appear in the record.

The main defense at the trial was that at the time Lyon received his injuries the contract of insurance, by its own terms, had expired and became null and void by reason of the non-payment of the premium. The plaintiff insisted that the premium for the third insurance period had been paid; that the defendant waived payment and forfeiture of the policy by its July and August calls upon the railway company; that the defendant retained the order and did not notify Mark Lyon of its non-payment, and did not disclose a forfeiture of the policy.

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The Circuit judge held as matter of law, from the facts as found, that the premium was not paid for the third period mentioned in the policy, commencing July 3d and ending October 3d, and by reason thereof the contract of insurance was rendered of no effect, and that the defendant had not waived its right to make claim of non-liability, and rendered judgment for defendant.

Upon the facts disclosed by the record in this case, I fail to come to the conclusions arrived at by the Circuit judge. I think the facts in the case show clearly a transfer of the premium for the third period to the insurance company, and Mark Lyon received the consideration therefore in the policy issued to him. The assignment is in writing, and independent of the order given on the railway company for the amount. The order is but a notice to the railway company of the transfer, and voucher for it when paid. The assignment is complete without it, and the insurance company could, when the installment became due in May, have brought suit for it against the railway company. The assignment, though made at the time the policy issued, did not take effect until the money for the premium for the particular period was earned by the insured. The May installment was earned and in the hands of the railway company, in accordance with its rules and customs in dealing with the defendant in such cases, and its practice in this particular case, when the same became due. *Hall v. Steel*, 68 Ill. 231; *Mandeville v. Welch*, 5 Wheat. 286; 23 Am. Law Reg. (note to *Merchants' Nat. Bank v. Coates*) 189. It is true, non-payment of the premium for any one of the periods suspends the enforcement of the policy; but the insured, in a case like this, when he has provided for the payment when due, and the premium made is in the possession of the defendant or under its control, payment will be deemed to have been made, until the insured is notified by the defendant to the contrary. A failure of the railway company to make payment when the amount assigned became due will not be presumed.

It is claimed by plaintiff's counsel, and I think with much force, that under the facts and findings in the case the defendant waived the legal effect of non-payment of the premium by the terms of the contract, by the course it pursued with the order and claim transferred to it by the insured for payment. *Baker v. Union Life Ins. Co.*, 6 Abb. Pr. (N. S.) 144; 1 Big. L. & A. Ins. Cas. 595. A forfeiture for non-payment of premium is inserted in the

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contract for the benefit of the insurer. It may be waived by the company. A forfeiture is not favored either at law or in equity, and a provision for it in a contract will be strictly construed, and courts will find a waiver upon slight evidence, when the equity of the claim made, as in this case, is under the contract in favor of the insured. *Young v. Life Ins. Co.*, 4 Big. L. & A. Ins. Cas. 1; *Miller v. Brooklyn Ins. Co.*, 2 Big. L. & A. Ins. Cas. 35; *Bouton v. Am. M. L. Ins. Co.*, 25 Conn. 542; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Crane v. Dwyer*, 9 Mich. 350; *White v. Port Huron & Milwaukee Ry. Co.*, 13 Mich. 356; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Pulford v. Fire Dept. of Detroit*, 31 Mich. 458.

While I think the plaintiff's case might be safely rested upon the ground of waiver I prefer placing it upon the ground first stated, viz.: that payment of the premium will be presumed and deemed to have been made out of the fund provided and assigned to the company for that purpose, until notice of non-payment is given to the insured.

It is also claimed by plaintiff's counsel that defendant, in making its defense in this case, should have been confined to the ground on which it first placed its right to immunity, the State agent's letter to the plaintiff, and therefore the company could not claim the benefit given in the policy of reducing the claim of plaintiff to the sum allowed in case of death of the insured while he occupied a place in the railway company's employment, of increased hazard over the one he occupied, mentioned in the policy when he was insured.

I regard this position however as untenable. There would be some force in the suggestion if the plaintiff, in her letter advising the State agent of the death of the insured, had stated that when killed he occupied the place of increased risk. This she did not do, and of course the reply of the agent had reference only to the statement made in plaintiff's communication. The plaintiff in her right to recover will therefore be confined to the class of risk the position of the insured placed him in when killed in the railway company's service.

The judgment must be reversed and a judgment entered in this court in favor of the plaintiff and against the defendant for the sum of \$270, less \$13.50, being the premium remaining unpaid, with costs of both courts.

The other justices concurred.

Judgment reversed.

Noyes v. Southworth.

NOYES V. SOUTHWORTH.

(55 Mich. 173.)

Marriage — woman's will — subsequent marriage.

Where married women have power to make wills as if single, the will of a single woman is not revoked by her subsequent marriage.*

PROBATE proceedings. The opinion states the case.

C. N. Legg and John B. Shipman, for appellant.

Charles Upson, for appellees.

CAMPBELL, J. This is a contest over the will of Cynthia Southworth, made while she was a widow, before her marriage with appellant, and never revoked. Appellant contests it on the sole ground that her subsequent marriage to him was a revocation in law.

The will was made July 27, 1881, she being childless, and all the estate of which she was possessed at her death was owned before she married contestant. They were married February 21, 1882, and she died without children September 28, 1882.

Both the Probate and Circuit Courts of Branch county, where she had resided, sustained the will.

Laying aside such decisions as are made under statutes, the only foundation which has been suggested for holding a woman's marriage to operate as an implied revocation is the common-law rule to that effect, which was based on the effect of marriage on a woman's property and testamentary capacity. By marriage her personalty devolved on her husband, and left nothing for a will to operate on, unless possibly such rights in action as should not be reduced to possession during coverture. So it was further held that she could make no testamentary provision during coverture relating to her own property without her husband's concurrence, and this would prevent a revocation, as well as any other testamentary act, and a will cannot be recognized which is not subject to revocation by the testator. These were reasons enough to maintain the common-law doctrine. And the exceptions show that these were the only rea-

* See *Swan v. Hammond* (188 Mass. 45), 52 Am. Rep. 255.

sons, for they only extended to wills under powers of appointment, and devises which were suspended during coverture and revived by the husband's death. These doctrines are elementary, and a general reference to the authorities cited on the argument will suffice. See especially for the old doctrine, *Forse and Hembling's case*, 4 Coke, 61, and notes to modern editions, and the reference to Plowden 343; also 4 Kent. Com. 523-527.

Our Constitution has done away with all the disabilities of coverture on this head, and expressly authorized every married woman to make wills of her estate as if she were sole. This leaves her case to be governed by the same rule which would apply to any one else on change of condition. Apart from some decisions based on statutory or peculiar local usages, the doctrine is quite uniform that marriage alone, without birth of issue, will not revoke a man's will. It may be doubtful whether, under our statutes concerning children born subsequently, the birth of issue would have the same significance. That question is not before us. But there is no sound reason that we can perceive why in the absence of statute implied revocations should be extended, or should be differently treated as between men and women, when the property rights of married women have ceased to be hampered by marriage.

We do not think the case calls for the discussion of any doctrines which are not based on the rules and reasons of the common law, and which, when we depart from these, would lead into conjectural and uncertain results.

We think the will was not revoked, and the judgments below to that effect must be affirmed, with costs against contestant.

The other justices concurred.

Judgment affirmed.

Thayer v. Augustine.

THAYER v. AUGUSTINE.

(55 Mich. 187.)

Partnership — taking profits for rent.

Renting a saloon for a share of the profits of the business does not make the parties partners.*

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

W. S. Tennant, for appellant.

Frank E. Emerick, for appellee.

SHERWOOD, J. The plaintiff rented his building in East Saginaw to the defendant for a saloon, agreeing to take as rent therefor one-half of the profits made by the defendant in the business carried on in the building, the same to be paid weekly. The defendant carried on the business under this arrangement about eleven months, and on refusing to settle with the plaintiff at that time or pay the balance of the rents claimed by the plaintiff to be due him on the contract, plaintiff brought this suit to recover therefor, and on the trial at the Circuit before a jury obtained a verdict for \$300. The case is before us for review on error, the bill of exceptions containing all the testimony given in the case.

The principal question presented is, did the agreement for the pay for the use of plaintiff's building constitute the parties partners. If it did not, then of course the compensation promised, if any accrued under the contract, was to be rent, and the amount thereof depended upon the extent of the profits of the business.

It is evident from the testimony that the parties had no intention of carrying on the saloon business together. The defendant desired to do that alone, but wanted the plaintiff's building to do it in. It was from the saloon business that the profits, if any, were expected to arise. The parties had no mutual interest in the capital invested, the capital belonged exclusively to the defendant, and there was no stipulation for mutual loss. It is true the profits, if any, were to be divided; not however as proceeds of a joint venture by the par-

* To same effect, *McDonnell v. Battle House Co.* (67 Ala. 90), 42 Am. Rep. 99.

ties, but to ascertain what amount of the proceeds of the individual enterprise carried on by the defendant would indicate the rent to be paid for the use of the building. There is nothing in the contract tending to show the parties understood it as constituting a partnership between them, and this is an action between the parties, one in which their intention, when ascertained, should prevail.

Sharing profits, while always competent testimony in such cases, is not invariably a test of partnership. In this case it was a mere arrangement to determine the rental value of the plaintiff's real estate, and the profits are only referred to for that purpose. The plaintiff had no control whatever over them.

Courts are not called upon when constructing contracts, to abrogate or make them for the parties, but when required, to ascertain their provisions and enforce them. It seems quite clear to us that no contract of partnership existed between these parties, and the plaintiff was entitled to pursue the remedy he has to make his claim.

These views dispose of most of the questions raised in the case. It was necessary for the plaintiff to make some showing of the profits of the defendant's business in order to establish his claim and the extent of the same, and we think the testimony offered in that direction and the rulings of the Circuit judge relating thereto were all correct.

In determining the profits of the business the court instructed the jury they should first ascertain the gross receipts and the stock on hand at its cost price, less its depreciation, and deduct therefrom the expenditures and the debts. This we think was right, and not subject to the objections taken.

We find no error in the rulings or charge of the Circuit judge, and the judgment must be affirmed.

Judgment affirmed.

The other justices concurred.

Grammel v. Carmer.

GRAMMEL V. CARMER.

(55 Mich. 301.)

Banks — draft — remedy of payee.

An unaccepted sight draft on a bank does not operate as an assignment of the fund, and in the insolvency of the drawer the payee must share *pro rata* with other creditors.

PETITION for order on receiver. The opinion states the case. The petitioner had judgment below.

Olds & Robson, for petitioner.

Chas. F. Hammond and *Cahill, Ostrander & Baird*, for appellant.

COOLEY, C. J. The facts in this case are the following: On May 15, 1883, Eugene Angell was doing business as a private banker in Lansing, Michigan. His New York correspondent was the Chase National Bank. On the day named Grammel, the petitioner in this case, purchased of Angell two small drafts on the Chase National Bank, amounting together to \$174.50, and paid for them. They were ordinary bankers' drafts, payable at sight. Angell at this time was insolvent, though it was not publicly known, and two days thereafter he made a general assignment of his property for the benefit of all his creditors. Arthur N Hart was named assignee. Two days subsequent to the assignment the drafts of petitioner were presented to the Chase National Bank for payment, and payment refused upon the ground that the assignee had notified the bank to pay no drafts. The bank had moneys belonging to Angell at the date of the drafts more than sufficient for their payment, and continued to have until the time of their presentation. Hart, the assignee, failed to give bond as such, and under the statute the respondent Carmer was appointed receiver to execute the trust in his stead. The Chase National Bank then paid over to the receiver the balance which was due to Angell when he assigned.

On this state of facts the petitioner claimed to be entitled to payment of his drafts in full from the amount paid over to the receiver by the Chase National Bank, and he petitioned the Circuit Court for

an order directing such payment to be made. The receiver contested his right, insisting that he must receive proportionate payment with other creditors; but the Circuit Court made the order prayed for. The receiver appeals.

It is contended on the part of petitioner that a banker's sight-draft is in legal effect a check, and that if there are in the hands of the drawee funds for its payment, the payee is absolutely entitled to payment from such funds, and cannot be deprived of his right by any action of the drawer, or of the assignee or receiver of the drawer who would stand in his shoes. It is further contended that the holder of the draft may bring suit against the drawee for the amount if the latter refuses to make payment, and that in effect he has a lien upon the fund and may follow it into the receiver's hands if it is paid over to him. And several cases are cited in support of these positions.

The doctrine that a banker's draft, drawn and payable within the country, is in legal effect a check, is held by a divided court in *Roberts v. Corbin*, 26 Iowa, 315, in which case it was also held that the holder of a bank check drawn against funds sufficient for its payment may maintain suit for the amount against the bank if payment is refused. The case of *Munn v. Burch*, 25 Ill. 35, is relied upon as authority. An examination of the facts in that case will show very clearly that the question supposed to have been decided by it did not arise at all, for the check which was in question had actually been received by the bank on which it was drawn and actually charged up to him on his pass-book. The court went beyond the case and expressed an unnecessary opinion, which in *Chicago, etc., Co. v. Stanford*, 28 Ill. 168, and *Union Bank v. Oceana Bank*, 80 Ill. 212, has been followed as authoritative. See also *Fogarties v. State Bank*, 12 Rich. 518; *Lester v. Given*, 8 Bush, 357. But the great weight of judicial authority is unquestionably to the contrary of this. In *Bank of Republic v. Millard*, 10 Wall. 152, 156, DAVIS, J., speaking for the court, says: "It is no longer an open question in this court since the decision in the cases of the *Marine Bank v. Fulton Bank*, 2 Wall. 252, and of *Thompson v. Riggs*, 5 Wall. 663, that the relation of banker and customer in their pecuniary dealings is that of debtor and creditor." He adds that on principle there can be no foundation for an action on the part of the holder of a check against the bank unless there is privity of contract between him and the bank. "How can there be such

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a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it; but in no sense can the bank be said to be connected with the transaction." See also *First Nat. Bank v. Whitman*, 94 U. S. 343. Many cases might be cited to the same effect if it were needful, but we think the case of *Perley v. County of Muskegon*, 32 Mich. 132; s. c., 20 Am. Rep. 637, recognizes the same principle.

This case however is not the case of a check, but of bills of exchange. The bills were drawn by banker upon banker, it is true, and against deposits made to meet them, and it might be difficult to say why any distinction should be taken between checks and such drafts as to the rules which should govern the rights of the parties. We have no occasion in this case to consider whether a distinction exists, because we think it clear that if it could be held, as some courts do hold, that the payee of a check drawn against actual deposits may sue the banker who refuses to pay it, it would be impossible to so hold in the case of a draft without disregarding long-settled rules.

The cases of *Williams v. Everett*, 14 East, 582, 597; *Yates v. Bell*, 3 B. & Ald. 643; *Hopkinson v. Forster*, L. R., 19 Eq. 74, and *Citizens' Bank v. First Nat. Bank*, L. R., 6 H. L. 352; s. c., 7 Moak, 56, are sufficient to show that the law in England is that the drawee of a bill of exchange is liable on it only after he has become acceptor. The same rule is recognized in *Mandeville v. Welch*, 5 Wheat. 277, 283, and *Bank of Republic v. Millard*, already cited. In *Gibson v. Cooke*, 20 Pick. 15; s. c., 32 Am. Dec. 154, it appeared that a party had drawn a bill which was dishonored for want of funds. Afterward the drawer remitted funds expressly to meet that and another small bill which had previously been drawn. The drawee paid the small bill, but refused to pay the other. It was held that the payee could not maintain an action against the drawee for the amount, there being no privity of contract between them. If any case could be conceived whose facts would support such an action, this must be such a case, for here the funds were remitted for the express purpose of paying the bill sued upon. To the same effect are *Bullard v. Randall*, 1 Gray, 605; s. c., 61 Am. Dec. 433; *Hopkins v. Beebe*, 26 Penn. St. 85; *Jermyn v. Moffit*, 75 Penn. St. 399; *Gibson v. Finley*, 4 Md. Ch. 75; *Poydras v. Delamare*, 13 La. 98; *Harris v. Clark*, 3 N. Y. 118; *Cowperthwaite v. Sheffield*, 3 N. Y. 243;

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Winter v. Drury, 5 N. Y. 525; *Noe v. Christie*, 51 N. Y. 273; *Duncan v. Berlin*, 60 N. Y. 151; *Tyler v. Gould*, 48 N. Y. 682; *Risley v. Phenix Bank*, 83 N. Y. 318; *Bank of Commerce v. Russell*, 2 Dill. 215; *Bank of Commerce v. Bogy*, 44 Mo. 13; *Weinstock v. Bellwood*, 12 Bush, 139; *Caldwell v. Merchants' Bank*, 26 U. C. C. P. 294.

The reason for these decisions is found in the fundamental rules governing this class of paper. The drawer, by drawing and delivering the paper to the payee, agrees that if duly presented it shall be accepted and paid by the drawee, and that in default thereof he will, if duly notified of the dishonor, pay it himself. The drawee enters into no contract relations with the payee in respect to it until it is presented to him, nor then unless he does so by acceptance. If he accepts, he undertakes to pay according to the terms of the bill or of the acceptance; but up to the time of that act the payee looks exclusively to the drawer for his protection. If the drawee refuses to accept when he has funds for the purpose, he becomes liable to the drawer for the wrong done to his credit. *Marzetti v. Williams*, 1 B. & Ad. 415; *Rolin v. Stewart*, 14 C. B. 595. But the payee can maintain no such action, for the plain reason that until acceptance the drawee owes to the payee no legal duty whatever. An action at law must be grounded on some failure in the performance of legal duty.

It is said a draft should be considered an assignment of so much money in the drawee's hands. If this were so, then drafts would operate as assignments in the order in which they were given, and should be paid in that order. But to so hold would be to introduce a new and vicious rule into the law of commercial paper. The well-understood rule — and we may add the convenient rule — now is that the drawee, when a draft is presented, should pay it if he has funds, and is not concerned with the question whether drafts of prior issue do not remain unpaid. But if a draft operates as an assignment, then either he would pay at his peril, or the payee receiving payment would be liable over to the holder of a prior unpaid draft for money received to his use. This rule would greatly and injuriously affect the value of this class of paper for commercial purposes.

Something has been said in this case about this being an equitable proceeding, as if that should make a difference in the rules that should be applied to it. But in no proper sense is this an equitable

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proceeding at all. The receiver is appointed by an order made on the chancery side of the court; but this merely puts him in the place of the assignee who failed to give bond, and in order that creditors may enforce through him their legal rights. When Angell failed, this petitioner had certain legal right in respect to this paper, and these rights qualified the rights of all other creditors. The failure of Angell and the appointment of this assignee could not increase the petitioner's rights at the expense of other creditors; it leaves them as they were, to be enforced by such remedies as shall be appropriate. The statute which prescribes this particular remedy has no purpose to modify rights in any manner.

But if this were strictly an equitable proceeding it would make no difference. Courts of equity have no different rules in respect to the rights and obligations of parties to negotiable paper to those which are recognized in courts of law, but they recognize and enforce the same rules, and there would be gross injustice in their doing otherwise. Some of the cases above cited in support of these views were cases of equity.

The order of the Circuit Court is erroneous and should be set aside.

Judgment reversed.

CAMPBELL and CHAMPLIN, JJ., concurred.

CONDON V. MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY.

(33 Mich. 318.)

Carrier — Liability pending transfer of freight to another carrier.

If a common carrier of freight to be transferred to another carrier merely stores it in a warehouse of its own whence the other is in the habit of taking it at its convenience, and the freight while so stored is destroyed, the first carrier is liable for its value.

ACTION for value of freight. The opinion states the case. The plaintiff had judgment below.

W. P. Healy, for appellant.

Chandler, Grant & Gray and *T. L. Chadbourne*, for appellee.

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COOLEY, C. J. The plaintiff shipped goods from New York by the New York Central & Hudson River Railroad Company, directed to himself at Hancock, Michigan, and they were carried in succession by connecting carriers until they were delivered by the Chicago & Northwestern Railway Company to defendant at Negaunee on March 12, 1883. The goods were carried by defendant over its road to L'Anse, where they arrived March 13, 1883, and were placed in defendant's warehouse. There they remained until March 20, 1883, when they were destroyed by an accidental fire. L'Anse was the terminus of railroad transportation. From thence to Hancock goods were carried in boat during the season of navigation, and by teams for the remainder of the year, by a carrier known as the L'Anse & Houghton Overland Transportation Company, which occupied for its purposes at L'Anse the warehouse of the defendant. It seems to have been the customary mode of business for the receipts of goods to be entered at the warehouse upon books of the defendant which were open to inspection by the L'Anse & Houghton Overland Transportation Company, and which were regularly inspected by the agent of that company to ascertain what goods were to be taken by it. That company was then accustomed to take the goods for Hancock and other places on its line, load them in sleighs or other vehicles at the warehouse, and then receipt them to the defendant.

When the goods of the plaintiff were received by defendant no notice was given to him, nor was the attention of the agent of the transportation company called to them, or any request made that they should be removed. They simply remained in the warehouse, without action by any one in respect to them until the fire took place. The goods having been destroyed, plaintiff claimed from the defendant payment of the value, and that being declined, the present suit was instituted.

The first count of the declaration charged the defendant as common carrier with the duty to carry the goods over its line to L'Anse, and there deliver them to the L'Anse & Houghton Overland Transportation Company, and the breach of duty alleged was the failure to deliver to that company. The trial judge instructed the jury that if the goods were shipped from New York, consigned to or marked for the plaintiff at Hancock, Michigan, and came into the hands of the defendant from the Chicago & Northwestern Railway Company to be carried by defendant in the usual course

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of its business to L'Anse, there to be delivered to the L'Anse & Houghton Overland Transportation Company for transportation to Hancock, then the defendant received such goods as a common carrier, and remained such common carrier during the transportation of the goods to L'Anse, and after their arrival there for such reasonable time as, according to the usual course of business with the L'Anse & Houghton Transportation Company, would enable defendant to deliver the goods to that company, and no delay in taking goods on the part of the transportation company, incident to the usual course of business between the two companies, would exonerate the defendant from its liability as a common carrier. It would be the duty of the defendant to deliver or offer to deliver the goods to the L'Anse & Houghton Transportation Company to be transported to Hancock, and if the goods were not so delivered or offered to be delivered, plaintiff was entitled to recover.

Under this instruction the plaintiff had judgment, and the defendant brings error.

The question which the instruction presents is one upon which the authorities are somewhat divided. It received careful attention at the hands of the New York Court of Appeals in *McDonald v. Western Railroad Corporation*, 34 N. Y. 497, where several opinions were delivered. The facts upon which the decision was to be made were in all respects similar to those now before us, and the judges were unanimous in holding that the railroad company was liable. WRIGHT, J., said: "The goods had been received by the defendants at Chatham, to be transported to Binghamton by way of the Erie and Chenango canal. Their obligation therefore was to carry the goods safely to the end of their road and deliver them to the next carrier on the route beyond. A carrier in such case does not release himself from liability by simply unloading the goods at the end of his route, and placing them in his own storehouse, without delivery or notice to, or any attempt to deliver to, the next carrier." HUNT, J., in a concurring opinion, referring to *Ladue v. Griffith*, 25 N. Y. 364, as a somewhat similar case, said: "The defendants in the present case did no act indicating that they had renounced the liability of a carrier. They simply unloaded and deposited goods in their warehouse. Had this deposit been made in the warehouse of a company engaged in canal transportation westwardly, it would have been an act of great significance. But here the fact is expressly found that it was the custom of the

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further carrier to take the goods from the defendant's depot. 'The liability of the further carrier did not commence until he removed the goods from the defendants' warehouse. The deposit therefore by the defendants in their own warehouse did not afford any evidence of a renunciation of the carrier's liability.' And he added that the deposit of the goods in the warehouse was to be considered a mere accessory to the carriage by defendant, and their liability as carrier was therefore unbroken.

This decision was approved as sound and followed as authority in *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622; s. c. 6 Am. Rep. 152, and it is undoubtedly the settled law of New York at this time. The same doctrine was laid down in *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619; s. c., 11 Am. Rep. 630, in a forcible opinion by DIXON, C. J., and also in *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376; s. c., 18 Am. Rep. 340, which cites with approval the case in 34 N. Y. Reports. The like doctrine also appears to be recognized in *Erie Railroad Co. v. Lockwood*, 28 Ohio St. 358; *Brintnall v. Saratoga, etc., R. Co.*, 32 Vt. 665; *Packard v. Taylor*, 45 Ark. 402; s. c., 37 Am. Rep. 37; and *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. 253. It was also affirmed in *Michigan Cent. R. Co. v. Manufacturing Co.*, 16 Wall. 318. This last case expresses views not in harmony with the opinion of this court respecting a certain clause in the charter of the Michigan Central Railroad Company as expressed in *Michigan Central R. Co. v. Hale*, 6 Mich. 243, and *Same Company v. Lantz*, 33 Mich. 503; yet as the question now under consideration was considered and decided by the court upon common-law principles, the conflict of views on the question of construction is of no importance in this case.

We think these cases lay down a rule which is just to shippers of goods, and not unreasonably burdensome to carriers. The shipper delivers his goods to a carrier, who becomes insurer for their safe transportation; and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon some one during the whole period. The duty of the one is not discharged until it has been imposed upon the succeeding carrier; and this is not done until there is delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of the business, is equivalent to a tender of delivery. There is nothing in this which is burdensome to the car-

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riers; for this is the customary method in which the business is done; and the rule only requires that the customary method shall be pursued without unreasonable delay or negligence.

The connecting carriers in this case appear to have established a custom of their own, under which actual delivery of the goods or notice to take them was dispensed with, and the one was to ascertain from the books of the other what goods were ready for reception and further carriage. This, as between themselves, was well enough while it worked well; but it was an arrangement to which the plaintiff was not a party, and the defendant could not by means of it relieve itself of any liability which duty to the plaintiff imposed. And it was clearly its duty to the plaintiff, as we think, to relieve itself of the responsibility of the goods remaining for an unreasonable time in its warehouse; and to do this, it was necessary that the responsibility be transferred to the carrier next in line. But the mere permission to inspect its books and take whatever was ready for carriage would not do this; there should have been distinct notice which would apprise the other carrier that defendant expected the removal of the goods.

In this case there were no facts indicating a renunciation, as to these goods, of the liability of common carrier by the defendant, or that it was supposed by the agents of the defendant that that character had been exchanged for any other. If it ever was, it must have been at the moment the goods were received; for nothing took place afterward to change the relation of the defendant to the goods until the fire took place. But we are not ready to assent to the doctrine that a railroad company, as to goods transported by it, ceases to be carrier the moment the goods are received at its warehouse. We do not think that is the law, or that it ought to be.

The judgment should be affirmed.

Judgment affirmed.

CHAMPLIN and SHERWOOD, JJ., concurred.

CAMPBELL, J. In this case it is admitted by the undisputed facts that the property in question had been in defendant's warehouse for a longer time than was generally necessary for the removal of goods by the ultimate carrier, and that the failure was due to a lack of means of removal in the latter. It also appears that the property was in a warehouse from which the last carrier always

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took it without any further ceremony, and that this carrier was always informed by inspection of the way-bills and knew of the goods being ready for removal. I think that under such circumstances defendant no longer remained responsible as carrier, but became subject to no more than a warehouseman's responsibility, as soon as the last carrier had actual notice and could have removed them, and that respondent is not to be prejudiced by the lack of facilities in that carrier, who had the same means of access to and control over the goods. Such seems to me the purpose of our statute, which does not declare or provide that the liability of warehouseman for goods awaiting delivery shall not arise when the real duties of carrier have been fulfilled, but merely requires that the responsibilities attaching to a carrier shall not be lessened while that relation exists.

BACON V. MICHIGAN CENTRAL RAILROAD COMPANY.

(55 Mich. 224.)

Libel — privileged communication.

A railroad company supplied its agents with a list of discharged employees, stating the reasons for discharge. When the reason stated was "stealing," and the charge was unfounded, *held*, a libellous publication.

LIBEL. The opinion states the case. The defendant had judgment below.

Clapp & Bridgman, for appellant.

Edwards & Stewart, for appellee.

CHAMPLIN, J. Plaintiff brought an action against defendant for libel. The defendant is a corporation operating a line of railroad between Detroit, Michigan, and Chicago in the State of Illinois. It employs a large number of men in different capacities, and there are twenty-nine different places along the line of the road where agents are employed who have authority to employ men to perform services for the company. In order to secure competent and reliable employees, and to prevent imposition from discharged

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employees being again employed upon another part of the road, the defendant makes and keeps what it calls a "discharge list," in which are entered monthly the names of such employees as are discharged during the current month, their occupation, and under the heading of "Why Discharged," the reason or cause of discharge. Such lists are sent to each of the twenty-nine agents or heads of departments upon whom devolve duties touching the employment, supervision or selection of servants or employees of defendant. The defendant regards the keeping and distribution of such discharge lists among its heads of departments as an essential and necessary method of prosecuting its business, and as a necessary safeguard to protect itself against the employment of inefficient and unfit persons that have been discharged on some other part of the line.

The plaintiff resided at Niles, on the line of defendant's road, and had worked for defendant four or five years, first as a mason and for the last two or three years as a carpenter. About the 14th or 15th of November, 1882, he was at work for defendant at Michigan city, and rode from there to his home at Niles on the fast train. This train has a dining car attached, and a passenger before arriving at Niles left his overcoat in his seat and went forward into the dining car. Plaintiff claims that by mistake, when he got off at Niles, he took the passenger's overcoat in place of his own, and went into the tool-shop and threw the coat upon the bench and did not go back to the shop until the morning of the second day afterward, when Mr. Humphrey came in and asked if any of the men had taken a coat by mistake; that he replied to Humphrey, "Night before last I threw a coat on that bench; just look at that;" and told Humphrey, "if that is the coat he had better put a tag on it and send it back, but that my coat was gone," which he described, and Humphrey said it was in the baggage-room, and he went there and got it. Two or three days after that, he was discharged. The defendant showed that when the passenger reported the loss of his coat it instituted an investigation, and the assistant-superintendent was informed by defendant's special agent that the coat was taken while the passenger was out to supper, and that an old coat was left in its place; that he sent one of his men to investigate, and the gentleman's coat was found at the residence of Mr. Bacon, at West Niles; that the statement of the special agent was to the effect that there was such a difference between the two coats that Bacon must have known that he had taken a coat not belonging to himself.

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In the month of March following, the name of plaintiff was entered on the discharge list, which comprised the names of thirty in all, as follows:

"MICHIGAN CENTRAL RAILROAD COMPANY.		
<i>March.</i>	<i>Discharge List.</i>	<i>1882.</i>
NAME.	OCCUPATION.	WHY DISCHARGED.
Bacon, John.	Carpenter.	Stealing."

This list was sent between the first and fifth of April to the defendant's twenty-nine heads of departments above mentioned, in Michigan, Indiana and Illinois, one of which was sent to and received by G. W. Doliver, assistant-roadmaster at Niles. This list was in his custody and the only person who had access to his books was his clerk, Elon Lombard. No one ever applied to him to see the list, and he never showed it to any one. Plaintiff endeavored to ascertain the reason of his having been discharged. He inquired of Mr. Palmer, a foreman in the employ of defendant, and asked him if it was on account of the coat, and he did not say whether it was or not. In April, 1882, plaintiff had a conversation with Lombard in Mr. Doliver's office about the matter, and he showed plaintiff the discharge list for the month of March, 1882; and plaintiff then brought this action.

The defendant pleaded the general issue and gave notice that it would insist in its defense and give evidence tending to show that the said several alleged libellous publications in the declaration mentioned are true. On the trial the plaintiff called Mr. Doliver as a witness, who at plaintiff's request produced the discharge list. Having shown the facts above narrated the plaintiff then offered the discharge list in evidence, which was objected to as irrelevant and immaterial. The Circuit judge sustained the objection on the ground that the plaintiff had not shown a publication. This ruling was excepted to.

The defendant offered no testimony and the Circuit judge then charged the jury as follows: "This is an action for libel brought by the plaintiff against the defendant, charging him with a certain publication. The evidence introduced, or attempted to be introduced, I think does not sustain that proposition. Both parties having rested and there being no evidence before the jury that there was any publication, the only thing remaining for the jury to do is to

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bring in a verdict for the defendant." Exception was duly taken to this charge, and the jury rendered their verdict for defendant.

The only question presented by the record is, was there any evidence of publication of the alleged libel? If so, it was error to take the case from the jury.

In considering this question, it must be borne in mind that the words alleged are actionable in themselves, and imputed malice if false, and it must be determined irrespective of any defense based upon the question of whether the writing was under the circumstances privileged. That defense would have been proper after a publication had been shown, and in justification of the act.

It has not been without much reluctance and against strong dissent that corporations have been held liable to actions for libel, the opposition being based mainly upon two grounds :

First. That they are created for specified purposes, and libels composed and published by their officers or agents must necessarily be beyond the scope of the legitimate authority of such corporations, and therefore not binding upon them ;

Second. Because malice, which is a necessary requisite in libel, cannot be imputed to a corporation.

Since however corporations have taken such common and important parts in the business of the country, and have been created for almost every conceivable purpose where an aggregation of capital can be employed to advantage, it has been considered to be more consonant with the principles of justice to hold them to a large measure of the accountability which attaches to individuals. It is well settled in this State that an action can be maintained against a corporation for libel.

The acts of the managing officers of the corporation in carrying on its affairs and managing its business are considered the acts of the corporation itself. No question is made upon this point, and it may be considered as conceded that the act of the superintendent in sending out these discharge lists to the agents of the corporation was the act of the corporation itself. But the argument is, and the Circuit judge so held, that the transmission of the libel from the superintendent to the twenty-nine heads of department in Michigan, Indiana and Illinois was only passing the libel from one agent of defendant to another agent of defendant, and it had never reached the hands or knowledge of a third person, but in fact remained in the possession of the composer.

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This argument is wholly untenable. If a person compose a libel and send it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is a sufficient publication to support the action. There are in this country railroad and telegraph corporations whose lines extend through many States and who employ many thousand agents. There are a great number of insurance companies employing agencies in several States. Can it be possible that these corporations possess an immunity to defame any person by sending such libel to every agent in their employment? Why should they possess this immunity more than an individual employing a large number of agents? Why should it be held a publication in one case and not in the other? In my opinion every agent to whom this discharge list was delivered was a third person respecting this corporation and the plaintiff, and it constituted a publication of the libel.

The defendant presents a question to this court which was not presented or ruled upon in the court below. He has argued here that the communication, under the circumstances appearing in the evidence, was privileged, and therefore the question as to whether it was published has become and was quite immaterial.

I do not think it proper for us to consider this branch of the case presented by defendant's counsel, for the reason that the question of privilege was not brought before the court below; if it had been, the plaintiff would have been entitled to introduce evidence to show express malice. Although it is for the court to determine whether the subject-matter to which the libel relates, the interest of the author in it, or his relations to it, are such as make the communication privileged, yet the question of good faith, belief in the truth of the statement and the existence of actual malice are facts to be determined by the jury. *Klinck v. Colby*, 46 N. Y. 427; s. c., 7 Am. Rep. 360; *Hamilton v. Eno*, 81 N. Y. 116; *Adcock v. Marsh*, 8 Ired. 361; *Hart v. Gumpach*, L. R., 4 P. C. 439; *Fowles v. Bowen*, 30 N. Y. 20; *Gassett v. Gilbert*, 6 Gray, 94. The ruling of the court below in rejecting the discharge list as evidence, and holding that there has been no publication, foreclosed the plaintiff from the opportunity of introducing such proof.

The judgment must be reversed and a new trial granted.

Judgment reversed.

The other justices concurred.

English v. Franklin Fire Insurance Company of Philadelphia.

**ENGLISH V. FRANKLIN FIRE INSURANCE COMPANY OF
PHILADELPHIA.**

(55 Mich. 273.)

Insurance — fire — location of goods.

Goods described as contained in a dwelling house were insured against fire, and were burned while in a barn on the same premises, to which they had been removed, to the knowledge of the company. *Held*, that no action would lie.*

ACTION on a fire policy. The opinion states the case. The defendant had judgment below.

Tarsney & Weadock, for appellant.

Hanchett & Stark, for appellee.

COOLEY, C. J. Defendant, in January, 1883, issued to plaintiff a policy whereby he was insured to the amount of two thousand dollars on his household goods, furniture, clothing, etc., "all contained in his two-story frame dwelling-house and additions, occupied as a residence" in Saginaw city, and to the further amount of three hundred dollars on his horse, buggies, hay, etc., and barn tools. A fire occurred November 13, 1883, which so far injured the house as to render it uninhabitable. At the time of this fire much of the household goods covered by the policy was removed to the barn and stored there. The parties adjusted the loss by this fire, and no question now arises upon it. December 6, 1883, the barn was burned; and with it the household goods stored in it. Defendant adjusted and paid the loss by this fire so far as concerned the property commonly kept in a barn, but refused to pay any loss on household goods. For that loss this suit is instituted. The Circuit judge held there could be no recovery, and defendant had judgment.

It is claimed for the plaintiff that the barn in this case may be considered a part of the dwelling-house; it being within the curtilage. But there is no ground for this claim. This is a case of contract; and the question is what contract the parties have made.

* See *Noyes v. Northwestern F. Ins. Co.*, *post*.

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For some purposes the law regards a barn within the curtilage as part of the dwelling-house; but it is not popularly so regarded, and it must be very rare indeed that in a contract it is treated as such. It certainly was not so treated in this case. There were two classes of insured property; and the class to which the goods in question belonged was insured as situated in a described building, which the policy designates as the dwelling-house; and the description makes it very clear that no other building was understood to be included. The parties certainly did not understand that in insuring the household goods, etc., in the dwelling-house, and also horse, buggies, etc., and barn tools, the horse, buggies and barn tools were in the dwelling-house.

But one of the conditions of the policy would make the meaning very plain if it could otherwise have been considered in doubt. The assured is required to "state on oath in his proofs of loss that all the merchandise and personal property for which claim is made was at the time of the fire contained in the building or premises described in said policy." It was plainly impossible for this plaintiff to state in his proofs of loss that the property for the burning of which he now claims was in "his two-story frame dwelling-house and additions occupied as a residence," for it was in a very different building.

A further claim is, that defendant, knowing that these goods were stored in the barn, and not making any objection thereto, or cancelling the policy on that account, has waived the right to take the objection when a loss has occurred. But this is not a case of objection, and not a question of waiver. The question is, for what loss this defendant has undertaken to be responsible. Now we find the contract to be that defendant will be responsible for the loss by fire of these goods while they remain in the dwelling-house, but not when out of it. But the defendant could not insist that the goods should remain in the dwelling-house; plaintiff might remove them at will, and for any reason that might incline him to do so. And this being his undoubted right, there would be nothing for defendant to waive in respect to it. Waiver implies a right to object to what is being done; but there was no such right here. The defendant merely undertook for a certain responsibility while the goods were in the house; and it was at the plaintiff's option to have them there or elsewhere, as he pleased. If they were lost by fire when elsewhere, the loss was not one against which the de-

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fendant had undertaken to insure him. Nor was defendant called upon to cancel the policy by reason of the goods being removed from the building where they were insured. If the dwelling-house had been repaired and the goods restored to it, the policy would again have covered them; and this, for any thing that appears to the contrary, may have been what both parties desired. At any rate it does not appear that the plaintiff desired the policy cancelled; and if he had desired it, the cancelment would have been optional with defendant.

The cases of *Hartford Ins. Co. v. Farrish*, 73 Ill. 166; *Annapolis, etc., R. Co. v. Baltimore Fire Ins. Co.*, 32 Md. 87; s. c., 3 Am. Rep. 112; and *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; s. c., 14 Am. Rep. 249, support the views here expressed, and are decisive.

The judgment must be affirmed.

Judgment affirmed.

The other justices concurred.

SHACKELTON V. SUN FIRE OFFICE OF LONDON, ENGLAND.

(55 Mich. 288.)

Insurance — vacancy.

A house was insured while occupied by a tenant. The tenant moved out and the landlord at once moved his own goods in and began to clean up, meaning to live there himself, but the next day went away for three days' absence. While cleaning the house he ate and slept at a neighboring house, and after a few days went off again on a business trip. While gone the house was burned. *Held*, that the policy had not become void on the ground of vacancy.*

ACTION on a fire policy. The opinion states the case. The plaintiff had judgment below.

Hammond & Barkworth, for appellant.

James B. McMahan, for appellee.

COOLEY, C. J. The plaintiff sues as assignee of a policy of insurance issued by the defendant to Emma Norton, and insuring her

* See *Cook v. Continental Ins. Co.* (70 Mo. 610), 85 Am. Rep. 438, *Farmers Ins. Co. v. Wells*, 42 Ohio St. 519; *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504; *Barry v. Prescott Ins. Co.*, 85 Hun, 601.

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against loss or damage by fire or by lightning to the amount of four hundred dollars on her frame dwelling-house in Ludington, described in the policy as occupied by a tenant. One of the conditions of the policy was that "this policy shall become void unless consent in writing is indorsed hereon by or on behalf of the society if any building hereby insured be or become vacant or unoccupied for the purpose indicated in this contract, or become occupied in whole or in part for other and more hazardous purposes than those indicated in this contract." Upon this condition the present controversy arises.

The policy bore date May 7, 1883, and was for one year. The insured testified on the trial that her tenant left the house June 19, 1883. She was glad of this, because she wanted to occupy the house herself. She immediately moved her things into it; her furniture and all the goods she had. She was there in the house, occupied it, and expected to make it her home. She was getting ready, cleaning up, and doing all she could; her husband was sick, and she could only clean a little at a time, as she could not leave her husband long. On June 20th she started to take her husband to the dispensary at Chicago, and was gone not to exceed three days. She then stayed at home five or six days, leaving her things in the house all the while, but not staying there nights. Her father lived about forty rods away, and she stayed nights and took meals at his residence. The witness also had work done in the garden attached to the house. Some five or six days after her return from Chicago witness went away to canvass for certain goods which she sold, and which were principally hair-work. She went for this purpose into northeastern Michigan, and the house was burned July 4, 1883, before her return. On going away she put the premises in charge of Mr. Shackelton, who had an interest in them.

Upon this evidence and some other not material to be here mentioned, the trial judge instructed the jury that:

"If a man insures his dwelling-house and lives therein at the time, and contracts not to let the building become vacant and unoccupied, he cannot as a matter of fact vacate it absolutely, leave it in that condition and recover on a policy in case of loss.

"But if he goes off temporarily on business or matters for his own benefit or otherwise—temporarily merely, with the intention of coming back to his place and there living, and with no intention of abandoning the place—the contract will not be vitiated by that

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kind of a transaction ; and had the tenant in this case gone away on temporary business before he surrendered up the premises to this Mrs. Norton, and had the fire occurred while the tenant occupied it, there would be no question but that the company would be responsible for the loss if the going away was merely temporary with the intention of coming back and making it the home of the tenant.

“ I think in this case, gentlemen, if you are satisfied by a fair preponderance of the evidence in this case, or are clearly convinced that Mrs. Norton put her things into that building with the intention of making it her home and her residence as a matter of fact, — didn't live in it in person before the fire, but after placing those things in she went away on mere temporary business with the intention in her mind to come back and live there — that the premises would not be unoccupied and vacant within the meaning of this policy, and that the company would be responsible for the loss. She must of course have placed her goods in that building with the intention in her mind to make it her residence — to make it her home ; and must have gone away on business — temporarily gone away, simply for a temporary purpose ; not permanently, — not with the idea of abandoning the place ; if she went away temporarily to be gone a few weeks or a few days on business of her own, with the intention of coming back and living there, I do not think the policy is vitiated ; and I think the plaintiff in this cause who sues as assignee of the policy can recover in the case if you so find.”

The jury, upon this instruction, returned a verdict for the plaintiff and the defendant assigns error. The only question is whether the instruction of the judge can be supported.

We have concluded, after some hesitation, that the instruction should be sustained. There is no doubt that if the insured had actually begun living in the house before her departure on business, the temporary absence would not have affected the policy. In contemplation of law, her occupation of the house would have been continuous. *Stupetski v. Transatlantic Fire Ins. Co.*, 43 Mich. 373 ; s. c., 38 Am. Rep. 195; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; s. c., 23 Am. Rep. 111; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; s. c., 37 Am. Rep. 488; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; s. c., 34 Am. Rep. 106; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457. The only question then is whether the

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fact, that for the few days she remained at home before starting on the business trip, she did not sleep in the house or take her meals there, should make any difference. Under the circumstances we think not.

The insured had taken possession of the house, as the jury must have found, for the purposes of permanent occupancy. She had moved in her household furniture and other goods, and was cleaning and doing other work preliminary to living there in person. Nothing, apparently, was wanting to complete personal possession, except that she lodged and took her meals at her father's, a few rods off. Those facts were not conclusive against her occupancy. It could not be justly claimed, we think, that if a family, for the purposes of cleaning and interior decoration, were thus to sleep and take meals at a neighbor's, while busy in the house in working hours, they would in doing so vacate the house. But the case of such a family would be analogous to that of the party insured in this case.

Cases are cited and relied upon on the part of the defense which we think are distinguishable on their facts. *Wustum v. City Fire Ins. Co.*, 15 Wis. 138, was the case of a policy of insurance which by its terms required unoccupied property to be insured as such. The building insured was not occupied, but was not insured as unoccupied, and the policy was held inoperative for that reason. In *Ashworth v. Builders', etc., Ins. Co.*, 112 Mass. 422, s. c., 17 Am. Rep. 117, it was decided that merely using a house for the purpose of taking meals in it was not occupancy within the meaning of an insurance policy. "Occupancy," it was said, "implies an actual use of the house as a dwelling-place." The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy." This, we think, is true; but as we have seen, it does not follow that the presence of the occupant in the building should be continuous and uninterrupted. The necessity for temporary absences on business, or for family convenience or pleasure, is recognized, and the insured is understood to contemplate an assent to them. In *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass. 298, the question was whether a tenant who had occupied a house but had moved with his family out of it and was taking his meals elsewhere, could be said to be occupying it merely because some of his furniture remained in it, and he had not surrendered the key. It was very properly held he could not. *Herrman v.*

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Adriatic Fire Ins. Co., 85 N. Y. 162, was still more unlike the present case, and calls for no comment.

It is suggested on the part of the defense, that the vacating of the house by the tenant of itself put an end to the policy; but there is no force in the suggestion. The policy did not require a continuance of possession by the person then occupying; and Mrs. Norton's possession began when the other terminated, and was for the same purpose, namely, for a dwelling.

The judgment must be affirmed.

The other justices concurred.

Judgment affirmed.

AGNEW v. CITY OF CORUNNA.

(55 Mich. 423)

Municipal corporation — obstruction in street.

A horse was frightened at a boulder dug out of the side of a city street and which had lain there several days awaiting removal by a person who had asked for and obtained it for building purposes. *Held*, that the city was not responsible for a consequent injury.*

ACTION for injury to a horse and wagon. The opinion states the case. The defendant had judgment below.

A. R. McBride, for appellant.

Wm. A. Fraser and *Hugh McCurdy*, for appellee.

CAMPBELL, J. Plaintiff sued defendant for damage to a horse and buggy, relying on the statute which provides a recovery of damages for injuries arising by reason of streets being out of repair. Judgment went for defendant.

The accident occurred while plaintiff's son was driving through the streets of Corunna, during the day-time, and is claimed to have been the result of his horse becoming frightened by seeing a large stone standing in the highway, between the track usually travelled in the middle of it and the gutter at one side. He did not pass by it on this occasion, and it is insisted that while passing along the road in the next block, and beyond a street-crossing, the horse saw

* See *Piollet v. Simmers* (106 Penn. St. 95), 51 Am. Rep. 496.

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the stone, which was beyond the other side of the crossing, and turned up the side street and upset the buggy. There was a good deal of testimony on the disputed question whether the horse was really frightened at all, and whether the mischief did not come from an entirely different cause. There was also testimony bearing upon the fitness of the driver and his management in driving, as well as upon the other questions which were supposed to bear on corporate fault.

The stone in question was a boulder of some four feet in diameter which had theretofore lain in the road-bed, just coming to the surface, but not making any difficulty in passage. It was thought best however to remove it from its place, and make the road-bed of the ordinary material. Accordingly the stone was dug up and moved away from the track toward the side of the road, and left standing ready for removal, held in place by placing smaller stones under it. The city highway officials were about to carry it off when a person who desired it for building purposes asked for it and was given the privilege of taking and appropriating it. Before he removed it this accident happened. The testimony does not fix definitely the precise time during which the stone lay there after it was dug up, but varies from two or three days to four or five. There is no testimony that the roadway was out of repair, or that any of the damage claimed arose from defects in the track used by plaintiff's buggy.

The court below left the question to the jury as to the cause of the accident and the failure in duty of the corporation to remove the stone within a reasonable time, as well as the further question whether the stone in its place was calculated to frighten horses, and whether the driver was at fault himself. The jury gave a general verdict, and the grounds of it do not appear.

It is claimed by defendant in the outset, that the statutory remedy is confined to cases where the want of repair is the immediate cause of the injury, as where there are obstructions or defects in a roadway or bridge where the vehicle in passing over it encounters the mischief complained of. And it is also claimed that allowing things which are no part of a highway to stand in it temporarily cannot be treated as putting out of repair, which must relate to the way itself, and not to things disconnected from it. This construction of the statute is the natural and correct one. The statute does not seem to be aimed at indirect and remote mis-

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chiefs, but to those which follow from a direct injury caused by the want of repair. A similar question has come up in Massachusetts several times as to the law relating to injuries from things which did not obstruct passage, and it was held that where the damage was consequential, not on the effect of a want of repair, but upon fright caused to a horse which ran away and damaged the vehicle or persons he was drawing, or other analogous cases, it did not come within the rule, and the municipality was not liable. *Cook v. Montague*, 115 Mass. 571; *Bemis v. Arlington*, 114 Mass. 507; *Cook v. Charlestown*, 98 Mass. 80; *Kingsbury v. Dedham*, 13 Allen, 186; *Keith v. Easton*, 2 Allen, 552.

The road itself was not out of repair. It was in good order and passable. If the stone had any thing to do with the action of the horse and damage to the buggy, it was by frightening the animal, and not by hurting or impeding him. But if it is admitted, and the court below allowed the jury so to assume, that a city is liable for leaving or allowing in its streets that which is dangerous, by reason of its tendency to frighten passing teams, the question arises how far this record presents such a case. It will not do to apply any far-fetched and unreasonable rule in such cases. It was held in the case of *Macomber v. Nichols*, 34 Mich. 212; s. c., 22 Am. Rep. 522, that a steam-engine, which according to every-day experience is always a cause of terror to horses unused to meeting it in a highway, was nevertheless not in law or in fact an unlawful article to propel or draw there. And a similar rule was applied in *Gilbert v. Flint & P. M. Ry. Co.*, 51 Mich. 488; s. c., 47 Am. Rep. 592, to box cars. It is customary in all towns to allow ditches to be dug, and building materials of all kinds and colors to be piled up and kept for considerable periods in the body of the street. In many, if not in most places, the right to do this can only be had by license from the corporation, and it cannot be claimed that such a license can be granted to do a wrong, or create a nuisance. Such stones as that described are often used for building purposes, and left in the street like other building materials and sometimes broken up for use or sawed for use. It does not seem reasonable to hold that such things can be allowed to await the convenience of a person who wishes to use them near by, and yet not to await removal somewhere else. If this stone had been hauled to the place it occupied, in order to be used for building purposes, and left there for a considerable time, no one would think of regarding it as an actionable

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grievance. The use of streets for such purposes is too common to justify the owners of horses to assume it will not be allowed, and they should be prepared to guard against their animals' freaks and fears of such ordinary appearances.

The stone, as is not disputed, was lawfully put there in the first place, in the course of street repairs. If it was the duty of the city to see that it was not left there indefinitely, it was equally its right to sell or give it away, and having done so, it could take no steps to interfere unless at the worst the purchaser or donee delayed so long as to make it unreasonable to wait longer for him. It could not be responsible for any delay which was not reasonable.

As this case went to the jury and as it was argued here the plaintiff cannot make out error unless it was illegal absolutely to leave this stone where it was left any longer than was necessary to remove it. The court was called on to say that it was a nuisance in itself. This was refused, but it was left to the jury to determine whether it was or not, and also to determine whether it was allowed to remain an unreasonable time. It is difficult to see how the court could have gone further without imposing duties and liabilities on municipalities, which would be ruinous. These are the only questions which it is important to consider.

The judgment should be affirmed.

Judgment affirmed.

The other justices concurred.

REYNOLDS V. McMULLEN.

(55 Mich. 568.)

Executor and administrator — foreign — power over assets.

A mortgage upon real property in Michigan belonging to a person who dies in another State and whose estate is in course of regular and valid local administration in Michigan, may not be sold by a foreign administrator to strangers; the title thereto is in the local administrator for purposes of administration, and he alone can sue on it or assign or discharge it of record.

FORECLOSURE. The opinion states the case. The plaintiff had judgment below.

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Smith & Sessions, for complainant*Spaulding & Barker*, for appellants.

COOLBY, C. J. Some time in the year 1872 Warren A. Sherwood, who had previously been a citizen of Michigan, went to St. Louis, Mo., where he engaged in business. He was a bachelor, and took board at a hotel, and on March 27, 1876, died at the hotel intestate. He left a number of heirs at law, one of whom resided in New York, one in Minnesota, and all the others in Michigan. He left some land in Michigan and some debts, and he was owner at the time of his death of demands to the amount of upward of \$50,000 which were secured by mortgages on lands in Michigan. Among the mortgages was one given to secure a note made October 8, 1874, by William and Mary Lusk, for \$1,125 and interest, payable at St. Louis, Mo., or at such other place as Sherwood, to whom it was given, should elect in five years from date.

On the death of Sherwood, Matrom D. Lewis, claiming to act as public administrator for the city and county of St. Louis, took immediate possession of his personal assets, and claimed a right to administer upon them. The relatives of Sherwood were not present at the time, but the residence of those in Michigan was known, and Lewis immediately communicated with them by telegraph, and sent the body to them in compliance with their request. The relatives at once proceeded to have letters of administration taken out in Michigan, and Albert G. Russell, a brother-in-law of the deceased, was appointed administrator by the Probate Court for the county of Ionia on May 29, 1876, and duly qualified as such. After his appointment and qualification Russell called upon Lewis for the property belonging to the estate, but Lewis refused to surrender it, and persisted in his claim of the right to administer himself. In June, 1878, Lewis made public sale of the securities belonging to the estate, and they were sold for the most part for merely nominal sums. The Lusk note and mortgage, which were perfectly good securities, sold better than most of the others, and were bid off by one Flanagan for eighty dollars. The purchasers were notified before sale was made that the right of Lewis to sell was disputed, and that Russell as administrator claimed the securities. Flanagan subsequently gave an assignment of the mortgage to one Barr, and Barr executed a discharge of it on receiving six hundred

dollars or about one-half the amount due. The defendant McMullen has since become purchaser of the land, and claims to hold and own it discharged of the mortgage. Russell, the Michigan administrator, continued to act as such until September, 1878, when he died, and complainant was appointed and qualified as his successor. The present suit was then instituted, the purpose of which is to foreclose the Lusk mortgage. The defendants rely upon the proceedings by Lewis, the sale to Flanagan, and the subsequent assignment to and discharge by Barr. Decree was rendered in the court below in favor of complainant, and defendants appeal.

It is disputed by complainant that Sherwood at the time of his decease was domiciled in St. Louis, but on the evidence we are inclined to think that city must be deemed to have been his domicile, and we shall so assume throughout this opinion. The questions of importance in the case will then be: *First*, whether Lewis, as public administrator, had authority of law to take upon himself administration of Sherwood's estate; and if so, then *second*, whether under the circumstances he had power as such administrator to sell and assign the mortgage in suit. If either of these questions is answered in the negative, it will be fatal to the defense.

The office of public administrator is statutory in Missouri, and the statute contemplates action by him in the settlement of estates only in a few exceptional cases which are particularly specified. The statutory provision which was in force at the time of Sherwood's death was the following:

"It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons in his county in the following instances:

1. When a stranger dies intestate in the county, without relatives or dies leaving a will and the executor named is absent or fails to qualify.

2. When persons die intestate without any known heirs.

3. When persons unknown die or are found dead in the county.

4. When money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same.

5. When any estate of any person who dies intestate therein, or elsewhere, is left in the county, liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heir in this State.

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6. When from any good cause said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost." Wagner's Stat. 1869 (ed. 1872), p. 122, § 8.

Unless the case was such as to fall within one of these six classes, it is not pretended that Lewis had any right to intermeddle as public administrator.

That Sherwood was not a stranger in St. Louis is conceded. He was well known there and his name appeared in the directory as a business man of the city. His case did not therefore come within the first subdivision of the section above recited, or within the third.

Sherwood did not die without known heirs. His heirs were well known, and Lewis himself communicated with them immediately. The case was therefore not within the second subdivision above recited.

If Lewis was justified in interfering at all, it must have been under the fourth or fifth subdivisions of the section, and for the protection of the estate. But the fourth could not justify him because the relatives of Sherwood immediately offered to take charge of the estate, and would have done so but for his interference. They did in fact as soon as was practicable take out letters of administration in Michigan where they were particularly needed, and would no doubt have done the same in Missouri had it become necessary.

If they had failed to do so, any creditor in Missouri whose claim was not provided for might have taken out letters on his own behalf. No showing is made in the case that for any purpose of protecting the estate it was necessary or important that the public administrator should interfere, and his seizure of the effects and papers of the deceased and the subsequent sale of the assets for a trifling percentage of their value constituted a wholly unnecessary and reckless intermeddling with private rights which the statute of Missouri never intended to authorize, and which the enlightened tribunals of that State must have visited with condemnation had their action been invoked to authorize or sanction what was done. If the public administrator could lawfully administer in defiance of the wishes of the family, he must have had the right in any case in which he could reach the bed of death and seize the personal effects before the family could anticipate him.

We keep in mind the fact, in what we say in this connection, that Lewis was acting on his own motion and without the previous

authorization of any court. Had the proper Probate Court of Missouri, on being applied to, granted letters of administration on the estate of a person who had died when domiciled within the jurisdiction, a collateral attack upon its proceedings could not be countenanced. But this public officer acted without letters and was his own judge of the right to do so. Those who claim under an administration which is not judicially ordered are entitled to no presumptions in support of its authority. *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177. In this case the failure to show jurisdiction is complete. There could not well be a more unnecessary, wanton and injurious interference with the rights of others than this record discloses. But we do not place our judgment in this case exclusively upon this ground, because we think if Lewis as public administrator had authority to act, he had none under the facts disclosed to make sale of the mortgage.

We concede to the fullest extent the general principle relied upon by defendants, that personal property, in contemplation of law, accompanies the person of the owner, and that its disposition on his death is to be determined by the laws of his domicile. But while the rule of distribution is thus determined, the steps to reach it may be otherwise prescribed; and when the property is in one jurisdiction and the domicile in another, the necessity for distinct proceedings in administration may be imperative. The proceedings when taken in this class of cases are governed and regulated by certain rules of inter-State comity, which are thus stated by the Court of Appeals of New York: "It is an established doctrine, not only of international law but of the municipal law of this country, that personal property has no locality. It is subject to the law which governs the person of the owner, as well in respect to the disposition of it by act *inter vivos*, as to its transmission by last will and testament, and by succession upon the owner dying intestate. The principle, no doubt, has its foundation in international comity; but it is equally obligatory, as a rule of decision in the courts, as a legal rule of purely domestic origin. It does not belong to the judges to recognize or to deny the rights which individuals may claim under it, at their pleasure or caprice; but it having obtained the force of law by user and acquiescence, it belongs only to the political government of the State to change it whenever a change becomes desirable. But the right which an individual may claim to personal property in one country, under title from a person

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domiciled in another, can only be asserted by the legal instrumentalities which the institutions of the country where the claim is made have provided. The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed; but in respect to the legal assertion of that title it has no extra-territorial force. As a result of this doctrine it is now generally held everywhere, and it is well settled in this State, that an executor or administrator appointed in another State has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed." DENIO, J., in *Parsons v. Lyman*, 20 N. Y. 103, 112; citing *Morrell v. Dickey*, 1 Johns. Ch. 153; *Vroom v. Van Horne*, 10 Paige, 549; s. c., 42 Am. Dec. 94.

The same general doctrine is also concisely stated in a case in the Federal Supreme Court: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens." STORY, J., in *Vaughan v. Northup*, 15 Pet. 1, 5.

Lewis, then, if legally administrator in Missouri, had no official authority in this State except such as by comity would be recognized; and the rules of comity might be determined either by usage, of which the judicial decisions would be evidence, or by statute. Some of these rules are general and are well settled. There are cases, for example, where it has been held that a foreign administrator has a right to collect and take possession of personal property, and remove it for the purposes of administration: *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Brown v. Brown*, 1 Barb. Ch. 189; *Vroom v. Van Horne*, 10 Paige, 549; s. c., 42 Am. Dec. 94; *Riley v. Riley*, 3 Day, 74; s. c., 3 Am. Dec. 262; *Smith v. Gould*, 34 Me. 443; *Rand v. Hubbard*, 4 Metc. 252; *Marcy v. Marcy*, 32 Conn. 308; and where there are no domestic creditors or other claimants, there will be no occasion to question such cases. There may also be cases of payments to a foreign administrator which may be recognized there being no conflicting administration. *Williams v. Storrs*, 6 Johns. Ch. 353; s. c., 10 Am. Dec. 340; *Trecothick v. Austin*, 4

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Mas. 16, 33; *Wilkins v. Ellett*, 9 Wall. 740; *Vroom v. Van Horne*, *supra*; *Citizens' Bank v. Sharp*, 53 Md. 521. And where an administrator, in the forum of his appointment, has assigned demands *bona notabilia* there, it may be correct to hold that his assignee may sue thereon here in his own name, as was held in *Harper v. Butler*, 2 Pet. 239, and *Petersen v. Chemical Bank*, 32 N. Y. 21, and cases there cited, as to which see *Knapp v. Lee*, 42 Mich. 41.

But this case involves the validity of the assignment of a debt secured by a real estate mortgage on lands in this State. It was decided in *Cutter v. Davenport*, 1 Pick. 81; s. c., 11 Am. Dec. 149, that the foreign administrator had no authority to make such an assignment; and this is followed in the recent case of *Dial v. Gary*, 14 S. O. 573; s. c., 37 Am. Rep. 737. Whether these decisions would be followed in this State if there were no statute bearing upon the question, we do not care to inquire, because we think if the power to assign would exist independent of statute it does not exist under the statutes now in force.

The statutes provide for recognizing the authority of a foreign administrator when it becomes necessary to make sale of lands in this State, and prescribes the steps to be taken for that purpose. How. Stat., §§ 6057-6061. If administration is needed in this State for other purposes, new letters must be taken out; and an administration ancillary to one in another State would proceed like any other up to the time of accounting. And for the purpose of selling lands, it seems very clear that a public administrator could not be recognized in this State at all; for the statute contemplates the case of an administrator "appointed" in some other State or country, who shall produce and file in the proper court "an authenticated copy of his appointment." Section 6057. A public administrator having no appointment for the special case would not be within the terms of this statute.

But we may pass by without further remark any question of what Lewis might or might not have done had he undertaken to proceed in this State under its statutes. What he did in fact was to proceed without regard to the statutes and in contempt of authority which was being taken, in regular form at least, under them. And unless under such circumstances he had authority to sell and dispose of the mortgage in suit, it must have remained the property of the estate.

Now a mortgage of lands is in this State a conveyance within

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the meaning of the recording laws, and goes upon record as such. How. Stat., § 5689. It becomes necessary to record it therefore to prevent its being cut off by subsequent conveyances. How. Stat., § 5683. It is not allowed to be foreclosed under the power of sale until the mortgage and any assignment thereof are duly recorded. How. Stat., § 8498. And no one could make a valid assignment of a mortgage which would be sufficient for the purposes either of foreclosure or of record, unless his own authority was of record so that the title made under a foreclosure would appear by the record to be complete. It follows that a foreign administrator could make no assignment of a mortgage in this State; and this is so well understood that it is not uncommon in this State to have ancillary letters taken out here for no other purpose than to assign mortgage securities. The case of *Doolittle v. Lewis*, 7 Johns. Ch. 45; s. c., 11 Am. Dec. 389, in so far as it recognizes the right of a foreign administrator to foreclose under the power of sale, would be inapplicable in this State by reason of the statutory provisions referred to.

But a foreign administrator would be equally powerless to discharge a mortgage. The discharge is for the purpose of relieving the record of the apparent mortgage lien, and this would not be accomplished unless the authority of the party assuming to discharge was itself of record. The statute imposes a penalty on the mortgagee, his personal representative or assignee, who, when payment of the mortgage debt has been made, neglects or refuses, after demand, to discharge the mortgage. How. Stat., § 5704. But a foreign administrator who would be powerless to give a legal discharge could not be within the provisions of this section. Lewis therefore was assuming to sell a mortgage which he was without authority either to enforce or discharge.

But a perfectly conclusive objection to the validity of the sale of the mortgage made by Lewis is seen in the fact that there was at the very time an administration in this State. There is no ground for even a suggestion that that administration was invalid. The intestate left both property and debts in this State, and the jurisdiction of the court which made the Michigan appointment was unquestionable. Administration in Michigan indeed, if the estate was to be preserved from such ruthless destruction as Lewis undertook to visit it with, was a necessity; and if he had had any proper sense of his office and a due regard to the rights of parties concerned, he would have recognized the Michigan administration, and have sought

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to act in harmony with it. Conflict was for any proper legal purpose wholly unnecessary.

No case has been called to our attention in which it has been held that after letters issued in one State or country a foreign administrator can be recognized there even for the purposes of a voluntary payment; and the cases like *Vaughn v. Barret*, 5 Vt. 333; *Young v. O'Neal*, 3 Sneed, 55 and *Ferguson v. Morris*, 67 Ala. 389, which deny the validity of such a payment generally, if questionable when no domestic appointment exists, are perfectly sound and reasonable if there is at the time a valid administration in the State. See *Noonan v. Bradley*, 9 Wall. 394, 405. It is the duty of citizens of the State to recognize and defer to the judicial determination of its own tribunals, as much when they concern matters of administration as in other cases: *Henderson v. Clarke*, 4 Litt. 277; *Glenn v. Smith*, 2 Gill & J. 493; s. c., 20 Am. Dec. 452; and this is especially true in a case like the present where nothing existed to bring in question the judicial determination of the Michigan court, except the bare assertion of his own authority by the foreign official. By the law of this State the title to this demand for all purposes of administration was in the Michigan administrator, who might put it in suit when due or assign it of record or discharge it of record. He was therefore the only person who could be safely dealt with in respect to it. The claim by the foreign official was inconsistent with these undoubted rights, and was negatived by them.

The decree must be affirmed.

Decree affirmed.

CAMPBELL, J., concurred.

SHERWOOD, J. [Omitting statement.] The real question in the case, upon the facts appearing upon this record, is this: Were the debts owing by persons residing in this State to the deceased, assets to be administered by the court in Missouri, or by the court in Michigan? If such indebtedness constituted not only effects of the deceased, but assets proper to be administered in Missouri, then I do not think the decree made by the Circuit judge was right, and it ought to be reversed; but on the contrary, if they were assets to be administered in Michigan, then the decree at the Circuit ought not to be disturbed. There is no question but that the personal estate of the deceased must be distributed according to the law of his

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domicile at the time of his death; but this does not dispose of the question presented for our consideration.

It appears very clearly that at the time of Sherwood's death he had quite large interests in Michigan. In fact if the proceedings in Missouri are to be taken as any indication of the amount of his estate here, it would appear that the great bulk of his property was here. It further appears beyond question, I think, that the deceased at the time of his death was owing over \$2,500 to parties in this State; that his relatives and friends all lived in Michigan and New York, and that it was his express desire that when he died his remains might be removed to and buried here. It appears also that deceased had the note with him in Missouri when he died, but not the mortgage, and that when the note was sold there was an administrator duly appointed, and acting as such, and taking charge of the estate and effects in Michigan, where the note was given, and where the maker resided; that the note and mortgage, when sold in Missouri by the public administrator, were not yet due, and that he knew of the administration in Michigan at the time he made the sale and executed the transfer thereof.

The common law is in force and must prevail in this State, except so far as it is repugnant to or conflicts with our Constitution and statutes, and questions of right to property and remedies applicable thereto, contained in the common law and not clearly excepted from it, must be determined by it, modified only by such circumstances as make it inapplicable to our local affairs. Const. Sched. 1; How. Stat. 72; *Stout v. Keyes*, 2 Doug. (Mich.) 184; *Lorman v. Benson*, 8 Mich. 18. I know of no statute changing the common law upon the subject in our State, nor of any circumstances in our local affairs rendering it necessary. By the common law, debts due by specialty are esteemed to be the goods of the deceased where the securities are at the time of his death; but debts due by simple contract follow the person of the debtor, and are regarded as the goods of the deceased where the debtor resides at the time of the creditor's death. 3 Bac. Abr. (Wils. ed.) 37, 8; Toller Law of Executors, 55, 1 Wms. Saund. 174, note 3; *Speed v. Kelly*, 2 Am. Prob. Rep. 553; *Wyman v. United States*, 109 U. S. 654; *Slocum v. Sanford*, 2 Conn. 534.

I am unable to see any good reason for the distinction made between debts by specialty and by simple contract, or why they should not all be deemed assets to be administered at the same

place. The proceeds after payment of debts have all to be distributed according to the law at the domicile of the deceased; but such is the law as we find it, and a change is for the legislature, and cannot properly be made by this court. There can be no question but that the note was a simple contract debt and subject to the law applicable to that kind of claims. *Slocum v. Sanford, supra*; 2 Cooley Bl. Com. 510.

• This court has already decided that the debts in this State due to a person resident in another State, dying there, can only be enforced by an executor or administrator duly appointed here (*Vickery v. Beir*, 16 Mich. 50; *Thayer v. Lane*, Walk. Ch. 200); and such is the rule at common law. Story Conf. Laws, §§ 513, 514 and cases cited. The assignee of these claims due from the debtors in this State stands in no other or better position than did the public administrator who made the assignment to him, and could confer no rights which he did not possess (*Chapman v. Fish*, 6 Hill, 554; *Thompson v. Wilson*, 2 N. H. 291), and payment to him is no defense to this suit. *Disosway v. Carroll*, cited in 4 Lans. 191; *Vaughn v. Barret*, 5 Vt. 333; *Pond v. Makepeace*, 2 Metc. 114; *Riley v. Riley*, 3 Day, 74; *Glenn v. Smith*, 2 Gill & J. 493; *McLean v. Meek*, 18 How. 16. The proper place for administering such assets must necessarily be where alone payment can be enforced against the debtor. I can come to no other conclusion upon the facts appearing upon this record.

It necessarily follows that the note and mortgage were assets to be administered in this State, and that the public administrator in St. Louis acquired no right to sell or dispose of the same in that State to any person, or any right to the possession or control of the note and mortgage, further than to safely keep them and deliver the same to the administrator here when required, until after the estate in Michigan was settled and the debts there were paid. 2 Kent. Com. 433, 434; 2 Bl. Com. 509; Bac. Abr. "Executor" E.; *Byron v. Byron*, Cro. Eliz. 472; *Hilliard v. Cox*, Ld. Raym. 562; Salk. 37; Whart. Conf. Laws, § 604.

There is no doubt but that an executor or administrator may lawfully sell the personal estate of the deceased, unless prohibited, at public or private sale without the order of the judge of probate, within the jurisdiction of the court where such property is assets in his hands for administration. He may do so even at a discount, though the property sold be notes and mortgages (*Burt v. Ricker*,

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6 Allen, 77; 3 Redf. Wills, 226, 229, 236); and the purchaser will take a good title thereto, provided the property was assets within the control and jurisdiction of the court where administration was granted. He cannot make such sale however when he has not the right to enforce collection. *Yeomans v. Bradshaw*, 1 Carth. 373; *Tourton v. Flower*, 3 P. Wms. 369; *Isham v. Gibbons*, 1 Bradf. Sur. 69; Story Confl. Laws, §§ 512, 513, 514, 515a and 522, 523; *McCarty v. Hall*, 13 Mo 480; *Chapman v. Fish*, *supra*; *Goodwin v. Jones*, 3 Mass. 514; *Riley v. Riley*, *supra*; *Stearns v. Burnham*, 5 Greenl. 261; *Harrison v. Sterry*, 5 Cranch, 289; *Dawes v. Head*, 3 Pick. 138; *Harvey v. Richards*, 1 Mass. 423; *Glenn v. Smith*, *supra*; *Vaughn v. Barret*, *supra*; *Lee v. Havens*, Brayt. 93; *Thompson v. Wilson*, 2 N. H. 291; *Judy v. Kelley*, 11 Ill. 211; *Willard v. Hammond*, 21 N. H. 382; *Smith v. Guild*, 34 Me. 443; *Langdon v. Potter*, 11 Mass. 313; Rorer Inter-State Law, 248; *Speed v. Kelley*, 59 Miss. 47; *Owen v. Miller*, 10 Ohio St. 143; *Abbott v. Coburn*, 28 Vt. 663; *Vaughn v. Northrup*, 15 Pet. 1; *Noonan v. Bradley*, 9 Wall. 394; *Willits v. Waite*, 25 N. Y. 577; *Valle v. Fleming*, 19 Mo. 454.

I am aware there is a conflict of authorities upon this subject, and several very able jurists take a different view from that above expressed. *Petersen v. Chemical Bank*, 32 N. Y. 40; *Grace v. Hannah*, 6 Jones (N. C.) L. 94; *Rand v. Hubbard*, 4 Metc. 252. The weight of authority however I think is clearly in favor of the position herein taken.

I think the decree of the Circuit judge was right, and should be affirmed.

Judgment affirmed.

CHAMPLIN, J., did not sit in this case.

CASES
OF THE
SUPREME COURT
OF
TENNESSEE.

HAYES v. FERGUSON.

(15 Lea, 1.)

Landlord and tenant — insurance — rebuilding.

During a lease of real estate, providing that if the buildings, or any of them, be destroyed by fire, the lessees were to rebuild at their own expense, fire insurance policies on the buildings were issued to the lessors, but made payable to the lessees, who paid the premiums, and the insured property was destroyed by fire during the term, when the lessees collected the insurance money but declined to rebuild. *Held*, (1) That the lessors were entitled to recover of the lessees the amount collected by them on the policies. (2) That the lessees were not entitled to an allowance out of the insurance money for the loss of the use of the buildings for the balance of the term after the destruction of the property by fire.

BILL for rent and insurance. The head-note states the case.

Wright & Folkes, for complainants.

A. P. Liles, Humes & Poston and *Harris & Turley*, for defendants.

WILSON, Sp. J. [Omitting statement.] The second point of serious contention is the insurance money. It is not free from

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difficulty, and we are not aware that the precise point involved has ever been before this court. While the authorities are not in fatal conflict on the general principle involved, there is great conflict in the result reached in its application by different courts. The policies in this case were taken out in the name of Hayes and wife and children, and insured their property and interest, not the leasehold interest of the defendants. The contract was to insure the property of Hayes, wife and children, and the loss or damages paid under it was the contract value of their property, and not the value simply of the lease interest therein of the defendants. The provision in the policies, "loss, if any, payable to Ferguson and Hampson," cannot in legal effect convert the contract into one insuring simply the interest of Ferguson and Hampson.

As was said by the court in the case of *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391, construing a policy containing a similar clause, "they are merely the appointees of the party insured to receive the money." That was a case where the property of a mortgagor was insured and the policy contained a clause that the loss, if any, was to be paid to the mortgagee. And says the court, "the provision in the policy as to the loss payable to mortgagee had no more effect upon the contract of insurance than it would if it had been provided that the loss, if any, should be deposited in a specific bank to the credit of the party insured. There is nothing in the language of the policy in which the court can adjudge that in legal effect it is a contract insuring the interest of the mortgagee as such except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest, shall be payable to the mortgagee. That provision merely designates a person to whom such loss is to be paid, and shows that he is a person who may have an interest in its being so paid."

The defendants in this case did have an interest in the policies being paid to them. A fair and equitable construction of the lease imposed upon them the duty, and such was to their interest, to rebuild the gin-house and other property destroyed by fire, or to put up buildings of the same character, suitable to carry on the operations of the plantations. It is manifest, we think, that it was the intention of the parties, that the insurance money should be applied to replacing the property destroyed by the fire, as in erecting buildings and getting machinery that would meet the wants of the

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farm as did the property destroyed. This being so the defendants are not entitled to retain it. Upon the theory of the referees, that they were not bound under the lease, to restore or replace the property destroyed by fire, having refused to apply the insurance money to that purpose, and having, as they say, wrongfully abandoned the premises, thereby broke their contract of lease, we are unable to see upon what principle they are entitled to retain this money, a sum equal to the value of the use of the gin-house, mill, etc., destroyed, for four and half years, the period of time elapsing from their destruction until the expiration of the lease. They had the right to apply the insurance money to replacing the destroyed property, in order to its use by them under the lease. That was their interest in the policies. Even if it were optional with them to rebuild, the insurance money did not belong to them for any other purpose or to any greater extent than was involved in the use of the buildings and property destroyed; and when they voluntarily surrendered the premises and broke their contract, their interest in it and right to it ceased, and they should have paid it over to complainants.

We hold therefore that the complainants are entitled to recover this insurance money, less the premium of \$225, and the \$168.75, loss on grist-mill, with interest from the date they personally refused to apply it to replacing the property destroyed.

[Omitting other matters.]

Judgment affirmed.

ANDERSON V. NORTON.

(15 Lea, 14.)

Partnership — surviving partner — mortgage.

A surviving partner of an insolvent firm may not mortgage partnership property to secure one creditor in preference to others.

BILL to set aside mortgage. The opinion states the point.

C. F. Vance, for complainant.

Gantt & Patterson, Humes & Poston, J. J. Johnson, Smith & Collier, Estes & Ellett, E. L. Belcher, W. M. Randolph, and R. D. Jordan, for defendants.

Anderson v. Norton.

WILSON, Sp. J. [Omitting statement and other points.] The contention of the Bank of West Tennessee is that the deed of trust executed by Cook, surviving partner, to secure its debt, is valid, and gives it a preference over the general creditors of the firm of Cook & Co. Its debt is conceded to be a firm debt. It is evidenced by a judgment of this court. Norton was dead and the firm insolvent; and the question is: Can the surviving partner of an insolvent firm mortgage the real assets of the firm to one creditor, thereby giving him a preference over other creditors of the partnership?

"It seems to us," says Judge MCKINNEY in the case of *Bancroft v. Snodgrass*, 1 Cold. 430 *et seq.*, "that the doctrine which asserts such a power in the surviving partners is irreconcilable with the established rights, as declared by law, of the representatives of the deceased partner, as well as of the joint creditors of the firm, and consequently cannot be sound."

In the case of *Watkins v. Fakes*, 5 Heisk. 185 *et seq.*, this court, Chief Justice DEADERICK delivering the opinion, directly approve the case of *Bancroft v. Snodgrass*, above cited. The chief justice, after quoting or referring to this case, says: "It is furthermore declared in the case already cited in 1 Cold. that the joint creditors have an equity or *quasi* lien under and through which the specific lien of the partners entitles them to have the partnership effects ratably appropriated to the discharge of each and all of the joint debts in case of a dissolution by death or bankruptcy of one of the partners, citing Story Part., § 361; 2 Story Eq., § 1252; and this is said to be the "well established equity of all the joint creditors in the case of the death or bankruptcy of one of the partners." "If," continues the chief justice; "it be the imperative duty of the personal representative to see to the application of the joint effects to the joint debts, and if in case of the death or bankruptcy of one partner, the joint creditors have an equity or *quasi* lien entitling them to have the partnership effects ratably appropriated to the discharge of each and all of the joint debts, it is manifest that under the circumstances of this case no one of the creditors of the partnership is entitled to appropriate the partnership effects to his own debt to the exclusion of all other creditors." In that case it is to be noted that the chancellor, as in this case, gave certain creditors priority of satisfaction under an assignment. His action was reversed.

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The authority of these cases has not been shaken or doubted in an opinion delivered in any subsequent case before this court. To hold valid the assignment to the bank in this case we must reverse these decisions and the settled law in Tennessee. These decisions are not in conflict with the weight of authority in England, and from the other States of the United States. On the contrary they are abundantly supported. And while many forcible arguments, aided by a technical logic springing from other analogous powers, conceded to exist in a surviving partner in dealing with the effects of the partnership, can be presented in favor of reversing our rule on this subject, we can see no sound or sufficient reason, with respect to the harmony of our jurisprudence or the demands of public policy, to authorize us to change the forum rulings of this court.

The report of the referees in recommending a reversal of the decree of the chancellor on this point is correct.

Decree of reversal.

LIPES V. STATE.

(15 Lea, 125.)

Criminal law — evidence of physical examination of defendant.

On a question of footprints and an alleged peculiar structure of the defendant's feet, evidence on the part of the defendant, by witnesses who had recently or immediately before examined his feet, is competent.*

CONVICTION of murderous assault. The opinion states the case.

A. W. Campbell, A. W. Stovall and Pace & Braden, for defendant.

Attorney-General Lea and J. W. Cherry, for State.

FREEMAN, J. The defendants were indicted and tried by the Circuit Court of McNairy county charged with an assault with intent to commit murder in the first degree, by shooting one J. A. Barnes, in 1882. They were convicted of the offense as charged, and sentenced to three years in the penitentiary. They appealed

* See note, 88 Am. Rep. 540; *Blackwell v. State* (67 Ga. 76), 44 Am. Rep. 717.

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to this court. Several errors are assigned in favor of reversal as to defendant Lipes. We need notice but one, as it is conclusive of the case.

The shooting was done from a thicket near a field where Barnes was mowing at the time. He saw Gamble, as he swears, and fired a pistol until he had unloaded all the charges at him, after he himself was shot, and as he ran off. Tracks in a ditch near the fence showed that another party was present and this party barefooted. It was attempted by the State to identify Lipes as the other party by a peculiarity of the track, and the fact that he had a peculiarity in the shape and length of his toes, corresponding to the track found. The bill of exceptions contains a statement by the presiding judge, BATEMAN, that at the close of the testimony of the defense, it was first proposed by the defendant's counsel, that Lipes should pull off his shoes and exhibit his feet to the jury, but this was refused on objection by the State. It was then asked that the court appoint some one to examine the feet of defendant, which the court refused, stating as a reason that "evidence manufactured for the occasion was not competent, and could not be admitted." We gather that his counsel then started to take him out to examine his feet, when the court said, "you need not take the defendant out to examine his feet, for I will not stop the case for evidence to be manufactured, and will not permit such evidence to go before the jury," and required the defendant to come back and go on with the case.

Counsel then said, "we have had some witnesses to examine the defendant's feet," and they proposed to introduce them. The court replied he would not permit that or any other manufactured evidence to go to the jury. The defendant then introduced a party who proved that he had just examined the defendant's feet. The State objected to his testifying on the question, and objection sustained. Another witness was presented, who said he had just examined his feet, and he was not allowed to testify. The court however said they might introduce any testimony about his feet, provided it was not got up for the occasion, like that he had ruled out.

We think the excellent Circuit judge erred in these rulings. On a question of physical peculiarity that could only be proven by persons who had seen the feet of the party, we can see no reason why a party who had recently, or immediately before seen them, should not be as competent to testify as to what he had seen, as

one who had seen them a week or month before, or spoken from memory of how he had seen them when growing up with him, as a barefooted boy. Nor is there any reason seen why the fact might not have been investigated by competent men at any time and their testimony given to the jury. As a matter of course, the State could rebut by having other parties examine the feet as a physician, if deemed best under orders of the court, if any doubt as to the fact or whether the witnesses had told the truth. An examination in this case in presence of court and jury would have given the most satisfactory result. But what they might say, was to be judged of and weighed by the jury, and not assumed to be manufactured in advance of hearing the witnesses. The real matter was to ascertain how the fact was, and the best means of ascertaining the truth of the case is what is desirable, if truth, and not mere technical routine, is the object of the law.

For refusal of his honor to admit the testimony offered, the judgment as to Lipes must be reversed and remanded for a new trial.

As to defendant Gamble, we see no error of which he can complain in this record. The jury under a proper charge have found him guilty. The evidence not only does not preponderate against the verdict, but is largely in favor of the finding. If the jury had found differently, it would certainly not have been in accord with the weight of the testimony. We do not deem it necessary to go into an examination of the testimony to vindicate or sustain this conclusion, but only to state the result of an examination.

Let the judgment be affirmed as to him.

Judgment affirmed.

WILLIAMS V. STATE.

(15 Lea, 129.)

Criminal law — chance verdict.

On a trial for murder, the jurors agreed that the term of imprisonment to be inflicted should be ascertained by dividing the aggregate number of years voted for by twelve. The result was fifteen years and nine months. Then it was agreed to add three months, as it was not customary to return verdicts for fractions of years; and the verdict was returned for sixteen years. *Held*, a chance verdict, and set aside.*

* See 84 Am. Rep. 808, 815.

Williams v. State.

CONVICTION of murder. The opinion states the case.

A. W. Campbell and A. W. Stovall, for Williams.

Attorney-General Lea and J. W. Cherry, for State.

COOKE, J. The defendant was convicted of murder in the second degree, and sentenced to the penitentiary for sixteen years. He has filed the record and applied for a writ of error. In support of his motion for a new trial he adduced the affidavits of two of the jurors who tried the case, which disclosed the facts; that upon the retirement of the jury, after having received the charge of the court, in their consideration of the case, after they had agreed as to the grade of homicide of which the defendant was guilty, they differed widely as to the term of imprisonment the prisoner should undergo in the penitentiary. Some were for the highest and some for the lowest term, and others stood at different points between the two, when one of the jurors proposed that each juror should cast a ballot with the number of years he was in favor written upon it, and that the numbers thus ascertained should be added together, and the whole amount to be divided by twelve, which was done accordingly, when the amount thus ascertained proved to be fifteen years and nine months. It was then suggested by one of the jurors that it was not customary to render a verdict for fractions of a year, and proposed that three months be added to the fifteen years and nine months so as to make it sixteen years, which was agreed to by a rising vote, and thus the verdict of sixteen years was arrived at and reported.

In the case of *Crabtree v. State*, 3 Sneed, 302, which was a conviction for manslaughter, it was held that where it appeared that where the jurors severally stated the number of years which each thought the prisoner should be imprisoned, and dividing the whole by twelve, agreed upon the number thus ascertained as the term of imprisonment, the verdict thus obtained should be set aside and a new trial granted. In that case it was said that "the prisoner as well as the State is entitled to the unbiased judgment of the whole as well as every member of the jury as to the amount of punishment to be inflicted for the crime of which the defendant was convicted."

It was further said that the result was not the deliberate judgment of the jury, produced by agreement and reflection, in view of the particular facts of the case before them, but is made to depend

upon chance. In *Joyce v. State*, 7 Baxt. 273, which was also a conviction for manslaughter, where it appeared that the jury being unable to agree on a verdict, one of the jurors made a speech to them, saying "that he had been on criminal juries before, and it was usual, and the custom, for every man to put down on paper what he was for, and then to add the years of imprisonment so put down together, and divide the sum so made by twelve, and return the result as the verdict of the jury." The jury adopted this mode, and made up their verdict accordingly. It was held the verdict was improper, and should have been set aside.

This case falls directly within the principle decided in the cases above cited, and upon their authority the verdict in this case should have been set aside and a new trial granted. We are aware that it has been said in relation to verdicts thus obtained in civil cases, that where there was no agreement in advance that the result thus obtained should be the verdict, but the same was only adopted as an experiment to see what the result would be, and after it was so ascertained the amount was deliberated upon and adopted by the jury, or a different amount was upon further consideration adopted, it would not vitiate the verdict. * * * But in the cases above cited there does not appear to have been any express agreement in advance to adopt the result thus obtained as the verdict, and it is apparent in this case as well as those we have cited that the verdict was obtained by the means thus resorted to, and was not the deliberate judgment of each member of the jury upon the evidence, and produced by argument and reflection, but was the result of chance.

It can make no difference in this case that three months were added to the term thus produced, as the record shows that this was not done upon consideration of the case, and as the result of the deliberation of the jury upon the law and evidence of the case, but was added solely because of the statement of a juror that it was not customary to return verdicts for parts of a year. We are of the opinion therefore that there is error in the record, and the writ should be granted.

The judgment of the Circuit Court will be reversed and the cause remanded for another trial. An order will be made upon the keeper of the penitentiary requiring him to surrender the defendant to the sheriff of McNairy county, to be by him safely kept to await his trial according to law.

Judgment reversed and remanded.

Shea v. Donahue.

SHEA V. DONAHUE.

(15 Lea, 160.)

Partnership — settlement — re-payment of capital.

Where one partner furnishes the capital and the other his services and experience, the profits and losses to be shared equally, the latter partner is not entitled on dissolution to any part of the original capital.

BILL for partnership accounting. The opinion states the case.

J. W. Green, for complainant.

H. H. Taylor, for defendants.

COOPER, J. Bill, among other things, for a partnership account between Shea and Donahue. The capital of the partnership business was contributed exclusively by Shea, and the only question raised by the parties is whether Donahue, upon a settlement, is entitled to one-half of the capital thus advanced. The chancellor decided against Donahue, and he has appealed.

[The agreement of partnership, entered into March 21, 1877, provided as follows:

“ We do hereby agree to become partners as merchants in making, buying and selling all kinds of tinware, stoves, pumps, etc., in the city of Knoxville, Tennessee, for the term of one year from this date, under the style and firm name of Shea & Donahue. And to constitute a fund for the purpose, Timothy Shea has paid in as stock one thousand dollars, which will constitute a common stock, to be used and employed between us in buying goods, wares and merchandise. John Donahue, being a practical workman, and having considerable experience in the above named business, it is agreed that he will give the business his entire personal attention and the benefit of his experience to place against the cash furnished by said Shea. We are to bear the expenses and losses jointly and share the profits equally. The capital stock is not to be withdrawn by either party until the end of the term, but to be employed as capital unless otherwise mutually agreed between us in writing.”

* To this effect, *Glidewell v. State*, 15 Lea, 838.—REP.

The partnership business was in fact carried on for about three years, the agreement only stipulating for one year. The contention of the defendant is, that by the terms of the agreement he was entitled at the end of one year to an equal share of the profits of the business, and to one-half of the capital advanced by his partner, and this, although it goes without saying he would retain all his practical experience which was to be placed against the cash furnished by his partner. But the agreement is that the partners are only to "share the profits equally," not the profits and the capital. And the profits of any business are only what remains after deducting debts and expenses, and the capital paid in. Lindl. Part. 791, 806. The provision that the capital stock shall constitute a common stock, to be used in buying the materials and wares of their trade, merely designates the mode in which it is agreed that the capital shall be invested. And the further provision that the capital stock shall not be withdrawn by either party until the end of the term, was only intended to restrain the partners from drawing funds from the business so as to trench upon the capital while the partnership continued. There is nothing in the article of agreement to take the case out of the ordinary one of a partnership in profit and loss upon unequal capitals.

Of course the articles of a partnership may expressly provide for an equal division of the assets, upon a dissolution, notwithstanding an unequal advance of capitals by the respective partners. The same result may follow a continuous course of dealing upon a basis which implies such equal division. For if there is no evidence from which any different conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal, upon the favorite maxim of chancery, that equality is equity. But as Mr. Lindley tells us, the rule is when the partners have advanced unequal capitals, and have agreed to share profits and losses equally, without more, each partner is entitled to his advance before division, and a deficiency in the capital must be treated like any other loss, and borne equally by the partners. Lindl. Part. 807.

The only authorities adduced by the learned counsel of the defendants, in support of his contention in this case, are to the effect that property brought into the partnership business by the members of the firm, or bought with the capital advanced, becomes partnership property, and may be disposed of as such by one of the partners under his general powers as a member of the firm. And

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so it does beyond all question, for the very object of contributing capital, either in property or money, is to secure a partnership stock for the purpose of carrying on the common business. But this fact has nothing to do with the settlement between the partners of their accounts at the end of the partnership. "By the capital of a partnership," says Mr. Lindley, "is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business. The capital of a partnership is not therefore the same as its property; the capital is a sum fixed by the agreement of the partners, whilst the actual assets of the firm vary from day to day, and include every thing belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him, but the firm may owe him money in addition to his capital, *e. g.*, for money loaned. The amount of each partner's capital ought therefore always to be accurately stated, in order to avoid disputes upon a final adjustment of accounts; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the share of the whole assets will be treated as equal." Lindl. Part. 610. The same author adds in another place: "When it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is that losses of capital, like other losses, must be shared equally, but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as an aggregate fund which ought to be divided between the partners in equal shares": Lindl. Part. 67. On the contrary, in his chapter devoted to partnership accounts, he expressly tells us that the assets of a partnership should be applied as follows: "1. In paying the debts and liabilities of the firm to non-partners; 2. In paying to each partner ratably what is due from capital; 3. In paying to each partner ratably what is due from the firm to him in respect of capital; 4. And the ultimate residue, if any, will then be divisible as profits between the partners in equal shares, unless the contrary can be shown." Lindl. Part. 806.

In accordance with these principles, the following decision has been made by the Supreme Court of New York, in a case cited in a note to page 610 of Lindley on Partnership: "Where by the

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terms of the agreement the defendant furnished the capital stock, and the plaintiff contributed his skill and services, and the profits of the copartnership were to be equally divided, the plaintiff is not entitled to any part of the capital stock on a settlement of the affairs of the partnership. He has no interest in any part of the capital excepting so far as in the progress of the business the same may have been converted into profits." *Conroy v. Campbell*, 13 Jones & Sp. 326. The case, it will be noticed, is exactly in point. And to the same effect in principle are *Whitcomb v. Converse*, 119 Mass. 38; s. c., 22 Am. Rep. 311; *Knight v. Ogden*, 2 Tenn. Ch. 473, and *Shepherd, Ex parte*, 3 Tenn. Ch. 189. No case has been found to the contrary.

Affirm the chancellor's decree.

Decree affirmed.

LUCAS V. BISHOP.

(15 Lea, 165.)

Deed — appurtenances — grant of spring — overhanging shade tree.

SUFFICIENTLY reported, 52 Am. Rep. 864.

GOODWIN V. THOMPSON.

(15 Lea, 209.)

Water and water-course — navigable river — soil below low water-mark.

The soil in navigable rivers below low water-mark, as well as the use of the stream for purposes of navigation, belongs to the public, and the title is vested in the State for the use of the public, and a grant from the State to an individual, under the general land laws, which purports to include the bed of such a navigable stream, and to give the grantee the exclusive privilege of taking sand, gravel, and other deposits from the bed of the stream, is to this extent void.

TRESPASS. The opinion states the case. The plaintiff had judgment below.

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Taylor & Hood, for complainant.

Hood & Taylor, for defendant.

COOPER, J. Action commenced before a justice of the peace "for taking five loads of sand from the lands of plaintiff," and tried in the Circuit Court upon an agreed statement of facts. The trial judge rendered a judgment in favor of the plaintiff for a part of the sand sued for. Both parties appealed in error.

The defendant holds land under a grant from the State of North Carolina, lying on both the French Broad and Tennessee or Holston rivers near their junction. The grant calls for the bank of the river at the point of junction of the two streams, thence up the south bank of the French Broad river with its meanders for the distance of half a mile, thence after one or two calls, to the Tennessee or Holston river, thence up said river with its meanders to the beginning corner. Part of the sand was taken from the beds of both rivers, in front of the land thus bounded, between low-water mark and the center of the stream. Another part was taken from the bed of the French Broad river between the center of the stream and the low-water mark of the north bank, being the bank of the stream opposite to that called for by the defendant's grant, and the judgment of the Circuit Court was for that part of the sand so taken. The plaintiff claims under a junior grant from the State of Tennessee, issued in 1870, for about 7,000 acres, which covers the bed and both banks of the French Broad and Tennessee rivers where the sand was taken, and in express terms grants to the plaintiff the exclusive privilege of taking from the bed of said streams, within the boundaries of the grant, sand, gravel, and other deposits found therein. The agreed facts show that both rivers are navigable in a legal sense above and below the lands covered by the grants, and that the United States government has been for years, under acts of Congress, expending money on both streams, above and below the lands granted, for the purpose of improving the navigation.

Our courts, while adhering to the rule of the common law, that the owners of the banks of streams not navigable in a legal sense take title to the center of the water, subject to the public easement for purposes of navigation, have adopted the civil law as to streams navigable in a legal sense, and held that the call in a grant for such a river, or for a point on its bank, and thence up or down

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with its meanders, carries title at most only to low-water mark, the soil covered by the water, as well as the use of the stream for the purpose of navigation, belonging to and remaining in the public. *Elder v. Burrus*, 6 Humph. 358; *Martin v. Nance*, 3 Head. 649; *Stuart v. Clark*, 2 Swan, 10; *Possey v. James*, 7 Lea, 98. Under these rulings, it is clear that the defendant has no title to the soil under the rivers called for by his grant below low-water mark. And the only question raised by the agreed facts is whether the complainant's grant gives him any better right. That grant not only covers the two rivers, but expressly undertakes to give the grantee the exclusive privilege of taking from the beds of those streams, within its boundaries, "sand, gravel and other deposits found therein."

By the civil law, which we have adopted, the soil of a navigable stream covered by the water, as well as the use of the stream, belongs to the public. The title claimed by the plaintiff in this case to the beds of the two rivers, as well as his claim to the sand, gravel and deposits in the streams, is of course incompatible with the title of the public to the soil under the water. It is upon him to show that he has acquired the title of the public in some legal mode which divested that title out of the public and vested it in him. If it be conceded that the legislature, as the representative of the State, has the power to pass the title of the public to the plaintiff, he does not claim that the legislature has directly, by a legislative enactment, clothed him with the title. The agreed statement of facts shows that he merely obtained a grant, based upon regular survey and entry, under our general land laws. And the first point to be considered is, whether our general land laws admit of such a grant.

By the common law, the title to the soil under the waters, where the tide ebbs and flows, as well as the use of the waters, was vested in the sovereign for the public use. Hale *de Jure Maris*, chap. 3; *Warren v. Matthews*, 6 Mod. 73. The sovereign might, it seems, make grants of these waters, *e. g.*, for the purpose of a fishery, subject to the use of the public for navigation. *The Royal Fishery of the River Boyne*, Davis, 149. It is probable, as has been held by the Supreme Court of Mississippi, that the common-law doctrine was borrowed from the law of nations, tidal waters being public highways for all nations, over which consequently the State only could hold title or exercise control. *Steamboat Magnolia v. Marshall*, 39 Miss. 109. The idea of the sovereign, as an individual, having any property right in such waters has no doubt ceased to be

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entertained in England, and can hardly be said to have ever been recognized in this country. The almost universal doctrine in this country now is, that the State, in the case of land bounded by the sea, or an arm of the sea, holds the fee in trust for the public. 3 Wash. Real Prop. 359. "The civil and common law," he adds, "substantially concur in this respect, with the exception that by the former the seashore extended to the highest winter tide, whereas by the latter it is limited to the ordinary high water line." In the case of the lands originally held by the colonial government of Massachusetts, the government stood in two relations to its subjects, one as owner of the land to be granted to purchasers and settlers, to be held in severalty in fee, the other a prerogative right to the sea and seashore, in a fiduciary relation for the public use. *Commonwealth v. Roxbury*, 9 Gray, 492. And this seems to be the attitude of those States, in the matter of its public lands, in which the civil law has been adopted in regard to navigable streams. They hold the land to be granted to purchasers and settlers in fee, and the soil under its navigable waters, as well as the use of those waters, in a fiduciary relation for the public use. The presumption would be that the State only intended to exercise the former power in their general land laws, designed to enable the citizen to acquire title to a specific part of the public domain in severalty, and exclusively, free from all public use. The point was raised before the Supreme Court of the United States, under similar acts of Congress, and Mr. Justice CLIFFORD, who delivered the opinion of the court, seemed inclined to take that view, but the court preferred to put the decision upon the ground that the acts of Congress making provision for the survey and sale of public lands reserve the rights of the public to the navigable streams. *Railroad Co. v. Schurmeir*, 7 Wall. 272. The act of Congress relied on provided: "That all navigable rivers within the territory to be disposed of shall be deemed to be and remain public highways; and in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall be common to both." Mr. Meigs, in his argument in *Elder v. Burrus*, 6 Humph. 359, makes the same claim for our land laws, citing the laws, some of which do provide that when a survey is made on any navigable water, the water shall form one side of the survey. Be this as it may, we know that the legislature of this State has always been studiously careful of the rights of the public to the use of its

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navigable streams frequently enacting that certain streams were navigable which perhaps scarcely deserved the honor. And our courts have settled as the common law of the State that the soil under the waters of navigable streams, as well as the use of the waters, belongs to the public. This was said in a case in which one of the grants covered the stream and both banks, and would, in the opinion of the judge, have given to the grantee an island in the river, if the river had been navigable in a legal sense. *Stuart v. Clark*, 2 Swan, 10. The idea of this eminent judge manifestly was, that even if the lines of a grant crossed a navigable stream so as to include a part of the river bed, all that the grantee could claim would be both banks, and any island in the river to low-water mark, the bed of the river between the low-water mark still belonging to the public. There is an expression of opinion to the contrary by Judge CRABB in *Roberts v. Cunningham*, M. & Y. 67. But this intimation was made at a time when the great weight of authority was that navigable waters were limited to the ebb and flow of the tide. We think that the public use of our navigable rivers imperatively requires that the soil under the water should be in the State in trust for the public; that the title to the soil under such streams was not intended to be secured by individuals under our general land laws; and that any person setting up a claim thereto must be able to show an express legislative grant.

This conclusion renders it unnecessary to determine whether the legislature, under our Constitution, or upon general principles, could confer upon any individual or individuals a several and exclusive title to such property. "Navigable waters," says Judge Cooley, "are for the use of all citizens, and there can not lawfully be any exclusive private appropriation of any portion of them." Cooley Const. Lim. 736, citing a number of cases. The conclusion also renders it unnecessary to consider the effect of the acts of Congress, making appropriations to improve the navigability of these streams, upon the right of the State to make any grant which would give to individuals a right to interfere with the bed of the stream.

The judgment of the Circuit Court will be reversed, and a judgment rendered here in favor of the defendant against the plaintiff for the costs of the cause.

Judgment reversed.

Coal Creek Mining and Manufacturing Company v. Moses.

COAL CREEK MINING AND MANUFACTURING Co. v. MOSES.

(15 Lea, 300.)

Damages — measure — coal mined by mistake.

In a suit to charge defendant with the value of coal mined by him on the plaintiff's land, where the trespass is unintentional, the measure of damages is the value of the coal in the bed, with the incidental injury to the land. (See note, p. 421.)

BILL to charge for value of coal mined. The opinion states the case.

Andrews & Thornburgh and *A. S. Prosser*, for complainant.

Henderson & Jourolmon, for defendant.

COOPER, J. Bill filed March 28, 1884, to charge the defendant with the value of coal mined by him on the land of the complainant. The master and chancellor agreed upon the amount of coal mined, the exceptions of the parties to the master's report being all disallowed, and the chancellor charged the defendant with the value of the coal thus mined at the mouth of the mine, deducting only the expense of removing it there from the place where it was dug. Both parties appealed.

The defendant owned a small tract of land adjacent to a much larger tract of complainant's, the dividing line between the two tracts being well known and defined. The defendant made an opening on his land, about one hundred and forty-five feet from the dividing line for the purpose of mining coal, running the main shaft in a direction inclining toward the line, with branches right and left nearly at right angles therewith. It is conceded that some of these shafts to the right were driven over on the land of the complainant. And the contest is partly over the quantity of coal thus mined, and partly over the measure of damages sustained.

The bill charges that the defendant, in connection and partnership with others in working their mine, "unlawfully and without the consent" of complainant, had run the said mine over the boundary of complainant's land, and taken therefrom a large amount of complainant's coal, and sold and converted the same. That the complainant cannot state the amount of the coal thus

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sold and converted, for the reason that the defendant and his partners, with the purpose of preventing the complainant from ascertaining the amount, pulled down and took away the pillars and props which held up the roof of the mine, thereby causing the roof to fall in throughout a large extent of the entries and chambers, and rendering it impossible for the engineers and agents of the complainant to explore the mine, measure the excavations made and ascertain with accuracy the amount of coal taken out. The bill then adds: "Your orator charges that all the coal taken from your orator's land as aforesaid was still the property of your orator after it was mined and removed, and when it was converted, appropriated and sold by the defendant and his partners, and that all the money received by them or either of them, for said coal was in law received by them to the use of your orator. And your orator electing to sue for the value of said coal so converted, and not for the wrongful removal thereof, charges that said Moses, as one of said partners who appropriated, converted and sold the same, is indebted to your orator in the amount of the full value thereof after it had been brought to the surface and sold by them, or after it had been placed on the railroad cars for shipment to market." The prayer of the bill is that an account be taken of the amount of coal so converted, and for a decree therefor.

The defendant, in his answer, admits that in working the mine the foreman, superintendent and workmen did "inadvertently and unintentionally" run across the boundary into complainant's land, and remove therefrom a small amount of coal without the consent of complainant or warrant of law, and that the coal was taken and sold by the defendant. He says that the trespass was committed inadvertently, the defendant having frequently, and in ample time, directed the foreman not to go upon complainant's land, but to leave a safe margin, which instructions were intended to be complied with, and the mistake being occasioned by the unevenness of the surface of the ground, and the nearly level grade of the excavation. As soon as the defendant's attention was called to the fact, he at once stopped work in that part of the mine, and complainant never had any further cause of complaint. The answer further states that measurements were made and estimates taken by agents of the complainant sent for the purpose, so as to ascertain the amount of coal thus mined, with the result of which defendant was satisfied. From these measurements and estimates the defendant finds, he

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says, that the coal thus mined would not exceed 3248 bushels, which, at a royalty of one cent per bushel, the rate at which the complainant was leasing its lands for mining purposes, would be \$32.48. And in order to prevent litigation, he made a formal tender of \$90 to the complainant being about three times the actual sum due, "in full satisfaction of the coal mined," which sum he is ready to bring into court, if complainant will accept the same. Upon the refusal of complainant to accept the tender, defendant at once offered, if the company preferred a new measurement, to allow them to send any competent person to the mine, and to afford him every facility for making the measurement and ascertaining the quantity of coal taken, and to pay for the amount ascertained at the usual price. Shortly afterward complainant and defendant's partner agreed that an engineer might be sent by complainant to estimate the coal, to be paid for at one cent per bushel, but the engineer was never sent. The defendant denies that either he or his partner, with the design of preventing complainant from ascertaining the amount of coal mined, pulled down the pillars, props or supports of the roofs, and says that the falling in of the mine was the usual and necessary effect of time.

The proof shows that defendant commenced working his mine in August, 1880, the foreman being instructed not to cross the boundary line, but to leave a margin. The foreman says he did step the distance on the surface of the earth, intending to follow his instructions, but he was deceived in the direction of the first branch, and the miners themselves began to talk about the mine having crossed the boundary. Under these circumstances, on April 13, 1881, the complainant sent an engineer, who did actually measure the surface of the ground, and the first, second and third branches of the mine. As the result of this survey, the field notes of which are appended to his deposition in this cause, he found, and so reported to the defendant, that the first branch was over the line about twenty-seven feet, but that the other branches were not, and he told defendant's foreman how far he might safely go, which the latter marked on the walls of the cuts. Work was at once stopped in branch No. 1, and never resumed. The other branches were continued to be worked within the limits designated by the engineer. In June, 1881, the same engineer returned, and measured branches 5, 6 and 7, No. 4 having, it seems, fallen in, and told defendant, who was with him, that none of them were over

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the line. After the commencement of this litigation, the same engineer makes a new survey of the surface of the ground, and finds that he was in error in his first survey by about eleven and one-half feet, to that extent increasing the trespass on complainant's land, and the amount of coal mined. And the master has increased the estimate of coal taken, upon the basis of this last survey, to 8,890 bushels. The evidence is clear that neither the defendant nor his foreman intended to, or did actually permit the working of the branches beyond the points designated by the complainant's engineer, and the weight of proof is that the work was not carried any further. A few of the miners are introduced by the complainant as witnesses, who undertake to guess at the length of the several branches, only one of them having adopted any mode of measurement, and he only as to one branch. The testimony of these witnesses is corrected by the time books of the defendant, showing the actual amounts of coal mined and paid for. The master has considered the testimony, and properly enough, under the circumstances, has given it due weight in favor of the complainant. We concur with the chancellor in thinking that the master's estimate is substantially correct. The proof entirely disproves the charge of the bill that props were intentionally removed to prevent accurate measurements. The roof of the mine seems to have been of a rotten clay, through which water seeped, and fell in, in some instances, before the work was completed, and in other cases very soon after the work of mining ceased. But if the complainant had acted upon the defendant's proposition for new measurements about the time of the tender of \$90, which seems to have been within a month or two after the visit of complainant's engineer in June, 1881, there would have been little difficulty in obtaining accurate estimates.

Upon the foregoing facts we may say that it was the duty of the defendant in the first instance to have made the necessary surveys to prevent any encroachment upon the land of the complainant. He was in fault in not so doing, and he was also in fault in not keeping accurate accounts of the coal mined in each of the branches in the vicinity of the boundary line. For these omissions of duty on his part the master was clearly right in construing the evidence liberally against him. And if there had been the least evidence of bad faith on the part of the defendant, every intendment would be in favor of his adversary. But we think the evidence conclusively

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demonstrates his good faith. He not only threw no obstacle in the way of the complainant's engineer, but he showed his willingness to abide by his action. Nay more, after making a liberal tender upon the basis of the measurements of that engineer, conceding for the present that the measure of damages would be the usual royalty for mining, he was willing for a new measurement, and promised to settle by it. And there can be no doubt that he would have joined in making new measurements, leaving the question of the measure of damages open. Under these circumstances, the original fault of the defendant may be treated, in view of the assurances of the complainant's engineer and the subsequent conduct of the complainant, with leniency. The trespass on the complainant's land was clearly not willful and intentional, but inadvertent.

The authorities are hopelessly in conflict as to the proper measure of damages where coal or ore has been mined by one person upon the land of another. Much of this conflict has grown out of the forms of action at common law, and the difficulty of confining the recovery to mere compensation, where the principle, upon which the form of action was supposed to rest, allowed a larger recovery. The tendency of the recent decisions is to ignore the form of action, and to regulate the recovery by the rule of compensation, looking to the intention of the defendant. The course of English decision is curiously illustrative of the change of judicial opinion. Originally, even in the case of an inadvertent trespass, the plaintiff was held entitled to the value of the coal after it was mined, without any deduction for the cost of severing. *Martin v. Porter*, 5 M. & W. 551; *Morgan v. Powell*, 3 Ad. & El. 281; *Wild v. Holt*, 9 M. & W. 472. Afterward, the rule was modified so that in a case where the trespass was fully proved, but without fraud, it was held that the defendant was liable only for the value of the coal, deducting the cost of its severance and carrying it to the mouth of the mine. *In re United Merthyr Collieries Company*, L. R., 15 Eq. 46. Again, even at law, in an action of trover, if the jury found that the defendant acted fairly and honestly under a claim of right, they were instructed to give the fair value of the coal as if the coal field had been purchased from the defendant. *Wood v. Morewood*, 3 Ad. & El. (N. S.) 440. And finally, in a case in the House of Lords, it was held that where the defendant innocently and ignorantly worked the coal beyond his boundary, the measure of damage was the value of the coal *in situ*, in addi-

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tion to any surface damage there may be; *Livingston v. Rawyard's Coal Company*, 42 L. T. (N. S.) 334. And this rule has been adopted by the court of chancery. *Hilton v. Wood*, L. R., 4 Eq. 432; *Jegon v. Vivian*, L. R., 6 Ch. 760. The tendency of the American decision is to adopt the same rule, whether the action be trespass, as in *Foots v. Merrill*, 54 N. H. 490; s. c., 20 Am. Rep. 151, or trover, as in *Forsyth v. Wells*, 41 Penn. St. 291. "Where," says the court in this last case, "there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damage to the land as his mining may have caused. Such would be manifestly the measure in trespass for mesne profits." And so we have held in *Ross v. Scott*, in an opinion delivered with this. And such was the decision of this court in the case of a wrongful trespasser who cut timber on land in *Ensley v. Nashville*, 3 Baxt. 144

The complainant in his bill says that he elects "to sue for the value of said coal so converted, and not for the wrongful removal thereof." He then argues that his bill is in the nature of an action of trover for the conversion of the coal after it had been mined, and gives him a right to its full value without deduction, or at any rate, only a deduction for bringing the coal, after it is severed, to the mouth of the mine. And this is the rule of the early cases in England, and of the courts of Maryland and Illinois. But the fact that any deduction is allowed shows that the action of trover does not allow the plaintiff to recover the full value of the property converted. And the learned counsel of the complaint in this case admits that according to the authorities the recovery is increased or diminished by the greater or less wrongful intent in the conduct of the defendant. If, he says, the coal was taken under an honest but mistaken belief of ownership, the measure of damages is the value of the coal at the mouth of the mine, deducting the expense of digging and transporting it to the mouth of the mine. But if the action is thus flexible, it may well be made still more so in order to secure the end of all action, just compensation. "It is quite ap-

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parent therefore," says the Supreme Court of Pennsylvania in *Forsyth v. Wells*, *ut supra*, "that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. Where there is no fraud or violence or malice, the just value of the property is enough." And this is the result of the late English decisions in the action of trover. The action is therefore what our statute provides that all actions for wrongs to property shall be, in which money only is demanded as damages, and that is an action on the facts of the case. New Code, § 3441. And by waiving the tort, and coming into equity, the complainant has certainly not rendered his action less flexible. The facts of this case do not show any special ground for damages to the complainant's land, and all that he can reasonably ask is just compensation, which would be the value of the coal taken *in situ*, or the usual royalty for mining, one cent per bushel.

The tender made by the defendant to the plaintiff was not technically valid, because it was accompanied with the demand of a receipt in full, and because not brought into court. But we think it is sufficient, in connection with the other circumstances of the case, to require us to exercise the discretion of the Chancery Court in the matter of costs, and to charge the complainant with the costs of the court below. The defendant having prosecuted his appeal with effect, is of course entitled to the costs of this court as against the complainant.

NOTE BY THE REPORTER —See *Blair Avon Coal Co. v. McCulloch*, 59 Md. 408; s. c., 48 Am. Rep. 560, and note, 568.

The same doctrine was held in *Ross v. Scott*, 15 Lea, 479, where the court said: "The courts of law, trammelled by their forms of action and the principles upon which they were supposed to rest, such as title in replevin and conversion in trover, have found it very difficult to formulate a rule which would lead to uniformity in the recovery of damages for the same wrong. The result depended upon the form of action adopted and the time of bringing suit, and might be very different, although the real cause of injury was the same. We find a strong example in the case of the *Woodenware Co. v. United States*, 106 U. S. 432. There a trespasser cut timber from the public lands to the value of sixty dollars, which would have been the limit of the recovery in trover against the wrong-doer at the place. But he carried the timber to a distant market at a heavy expense, and sold it to an innocent purchaser for \$850. In an action brought by the United States against the purchaser in the nature of

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an action of trover, it was held by the Supreme Court that the recovery should be the value of the timber at the time of sale. The result may be logical, but the inequality between the damages and the recovery is too great to be satisfactory. And neither the English nor the State authorities have gone quite so far. The tendency of the courts, the text-writers all agree, is to look less to form and more to the substantial object of all rights of action, which is to redress the injury by just compensation. 3 Suth. Dam. 376, 488; 2 Sedg. Dam. 484; Add. Torts, § 539; 7 Cent. L. J. 301. 'A careful examination of the authorities,' says the Supreme Court of Nevada in a recent case, 'has convinced us that there is a growing inclination among all courts, where it can be done, to apply the only safe and just rule in actions of damages, whether *ex contractu* or *ex delicto*, and that is to give the injured party as near compensation as the imperfection of human tribunals will permit': *Waters v. Stevenson*, 13 Nev. 157; s. c., 29 Am. Rep. 293. 'In civil actions,' says the Supreme Court of Michigan, during the present year, 'the amount of recovery does not depend upon the form of the action in a case like the present (where logs were cut by mistake from the lands of another and hauled into a creek several miles from the land), but whether it be upon contract or in tort, the proper measure of damages, except in cases where punitive damages are allowed, is just indemnity to the party injured for the loss, which is the natural, reasonable and proximate cause or result of the wrongful act complained of.' *Ayres v. Hubbard*, 82 Alb. L. J. 217. And such was the rule of damages applied by this court in *Ensley v. Mayor, etc., of Nashville*, 2 Baxt. 144, where timber was cut by a willful trespasser. The measure of damages was held to be the value of the trees as they stood upon the land, and the injury to the land by their removal. The weight of authority both English and American now is, that where there is an honest dispute as to title, or where the trespass has been from ignorance and not willful, the damages will be confined to the value of the property before the trespass was committed, or to use the language of the English courts, 'at the same rate as if the property taken had been purchased *in situ* by the defendant at the fair market value of the district.' *Wood v. Morewood*, 3 Q. B. 440; *Jegon v. Vivian*, L. R., 6 Ch. 742; *Hilton v. Woods*, L. R., 4 Eq. 432; *In re United Merthyr Collieries Company*, L. R., 15 Eq. 46; *Livingston v. Raward's Coal Co.*, 42 L. T. (N. S.) 834; *Goller v. Felt*, 80 Cal. 481; *Forsyth v. Wells*, 41 Penn. St. 291; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Weymouth v. Northwestern R. Co.*, 17 Wis. 550; *Foot v. Merrill*, 54 N. H. 490; s. c., 20 Am. Rep. 151; *Longfellow v. Quimby*, 83 Me. 457; *Stockbridge Iron Co. v. Cove Iron Works*, 102 Mass. 80; *R. Co. v. Hutchins*, 82 Ohio St. 571; s. c., 30 Am. Rep. 629.

"The Court of Chancery is not hampered by forms, and possesses all the power and means to do exact justice as near as is possible. It never enforces forfeitures nor gives punitive damages. The fundamental rule of equity is to afford just compensation to its suitors. The bill before us is under our decisions one of pure equitable cognizance. *Almony v. Hicks*, 3 Head, 89. It seeks to remove the defendant's paper title as a cloud upon the complainant's legal title to the land in controversy, and as the necessary consequences of the decree to recover possession of the land in controversy and to have an account

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for mesne profits and waste. All that the complainant can claim on the account is just compensation for the coal mined and wood cut. That just compensation under the foregoing principles of law and the rules of a court of equity, is the value of the coal before it was mined, and of the wood before it was cut, with such damages, if any, as may be occasioned by the impairment of the value of the land by reason of the removal or mode of removal from the soil."

In *Woodenware Co. v. U. S.*, 106 U. S. 482, although the decision was as above described, yet the court said that the doctrine of the principal case was correct in the case of an innocent trespasser

CRAWFORD V. STATE.

(15 Lea, 343.)

Criminal law — obstructing railway.

When defendant placed obstructions on a railway, for the purpose of getting a reward from the company for notifying them of the obstruction, and signaled and stopped the train before it struck the obstruction, *held*, that he was guilty of willfully and maliciously putting an obstruction on the track.

CONVICTION of obstructing a railway. The opinion states the case.

S. G. Heiskell and C. F. Humes, for Crawford.

Attorney-General Lea, for State.

TURNER, J. Plaintiff in error was indicted in the Criminal Court for Knox county, and convicted of placing obstructions on the East Tennessee, Virginia & Georgia railroad, and sentenced for two years to the penitentiary. He confessed to having placed the cross-ties, rocks, etc., upon the road, but he said that he "put the ties and rock on the road to get a job; that he heard the train blow the signal for Concord, and ran down the railroad to stop it. He said if the engineer had not seen him when he was waving down train, all would have gone down together.

When signaled, a few minutes after one o'clock at night, the train "was running at the rate of thirty-five or forty-five miles per hour." The signal was given by plaintiff in error standing in the middle of the track, waving his coat and hat. Do the facts make

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a violation of § 4638, old Code, 5387 new Code, as follows: "Whoever willfully and maliciously puts upon the track of any railroad in this State any kind of obstruction, * * * so as to endanger the safe running of the locomotive and cars, or either or any of them, is guilty of a felony?" etc.

While the judge of the Criminal Court has defined the terms willfully and maliciously satisfactorily, it is insisted that as the prisoner placed the obstructions upon the road with a view to advance his own interest in the procurement of a job or other reward for notifying the company's agent of the obstruction, and not intending a wreck, the jury was not warranted in finding the verdict.

We do not think the purpose of the accused, as afterward declared by him, can avail him. Was the running of the locomotive and cars endangered? It was at least as late as one o'clock at night. The prisoner had to run down the road a sufficient distance to flag the train in time to secure a stop before reaching the obstruction. He was not prepared with any of the usual danger signals. He took the chance of the engineer failing to see him (who alone could see him, as the fireman was firing the engine). He undertook for the watchfulness of the engineer at a late hour of the night, and at a point where perhaps danger might be least expected. He not only risked the ruining of the train he signalled, but also of such as might be travelling a contrary direction, and voluntarily admits in his confession that if his signal had not been seen, or had been unheeded, all would have gone down together. If in his run to meet the train he had fallen, or if he had been off time, or any accident had occurred to prevent him from success in the attempt, a wreck was inevitable. All these risks were existing, yet he undertook to overcome them, and in the undertaking endangered the running of the train and the lives of the agents and passengers. His was an experiment that he could not possibly know would succeed. The want of such knowledge made the danger aimed against by the statute.

Affirm the judgment.

Judgment affirmed.

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GEORGE V. EAST TENNESSEE COAL COMPANY.

(15 Lea, 455.)

Contract—consideration—validity.

A contract to furnish plaintiff the trade of miners and workmen in consideration that defendant shall receive eight per cent on all such sales is valid, not in restraint of trade, nor immoral nor contrary to law.

ACTION for breach of contract. The opinion states the case. The defendant had judgment below.

John W. Greene, for George and Chapman.

Luckey & Yoe, for Coal Company.

DEADBICK, C. J. Plaintiffs sued the defendant in the Circuit Court of Knox county for breach of contract. Plaintiffs were merchants, and defendants had miners and workmen employed. The contract, as averred in plaintiffs' declaration, was, that defendants should furnish plaintiffs the trade of their miners and workmen, and in consideration therefor defendants should receive eight per cent on sales to said miners and workmen, and either party might terminate the contract on giving six months' notice. Plaintiffs aver readiness and willingness to comply, and that both parties performed their part until March 1, 1883, when defendants opened a store of their own, and abandoned the contract without giving notice, by reason whereof plaintiffs were deprived of large profits, etc., to their damage, etc.

A second count, substantially like the first, sets out the manner by which they were to keep accounts and settle.

The defendants demurred because: First. The contract was void for uncertainty. Second. It was *nudum pactum*. Third. There was no consideration. Fourth. Damages too remote and uncertain. Fifth. Contract is against public policy. The demurrer was sustained, without leave to amend.

Plaintiffs filed an amended declaration averring a contract to furnish goods, etc., and condition that either party might terminate it by six months' notice, also averring performance and readiness to perform by plaintiffs, and breach, without notice, by defendants.

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In a second count plaintiffs set out the facts that defendants were mining coal, having a large number of employees, and having a contract with said miners and workmen to receive, in part payment of their wages, goods, wares, and merchandise and provisions, contracted with plaintiffs for the exclusive supply from plaintiffs' store for such supplies, which plaintiffs were always ready and willing to furnish, in consideration of which defendants were to receive eight per cent on all sales to said employees, with liberty to either party to rescind the contract on six months' notice.

The plaintiffs then aver that defendants withdrew without giving notice, cutting off a large trade with said miners and employees for six months, to their damage, etc.

Defendants again demurred, and the demurrer was sustained, suit dismissed, and plaintiffs filed the record for writ of error. The causes of demurrer are: First. Because plaintiffs do not aver that they were able or willing to perform their part of the contract. But in the first count they do aver that they have always stood ready and willing to comply with their part of said contract, and that the same was performed by both parties up to March 1, 1883. Second and third causes are that the contract sued on is *nudum pactum*; and void for uncertainty. The consideration is to furnish goods and discount the bills eight per cent, and is a sufficient consideration to support defendant's promise. The terms of the contract are set out, and are sufficiently explicit.

The third and fourth causes are that the contract is against public policy, and the damages claimed too remote and uncertain. The court sustained the demurrer, and dismissed the bill, and the referees recommend an affirmance of the decree, and plaintiffs except.

If the contract is prohibited by law, if it be immoral, or contrary to public policy, it cannot be enforced. A contract not to carry on one's trade anywhere is void. But a contract not to carry it on in a particular place, or within certain limits is valid. 2 Pars. Cont. 748. In note z, citing numerous cases, showing progressive decisions from very early English cases to comparatively modern ones in that country and in this, the doctrine first held in the English cases is much qualified, and is as stated in the text. The same note cites the case of *Gale v. Reed*, 8 East, 80, very similar in its main features to this case. There A. & B. agreed to give C. two shillings on every hundred weight of cordage they should make, on the recommendation of C., for any of his friends and connections, C.

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binding himself not to carry on the business of a rope-maker. This was held to be a legal contract. We see nothing in this contract contrary to public policy. It is not in restraint of trade, nor immoral, nor contrary to law. Being a contract which the parties might make without violation of law, the demurrer to the declarations was improperly sustained. The plaintiffs, if the contract was made, and has been violated without excuse, would be entitled to some damages.

The report of referees will be set aside, the judgment reversed, and cause remanded for further proceedings.

Judgment reversed.

STATE V. MAYOR, ETC., OF NASHVILLE.

(15 Lea, 697.)

Municipal corporation — ordinance — change of salary — estoppel.

A city charter forbidding any change in the mayor's salary during the term of his office is infringed by an ordinance providing that after the expiration of the term of the then mayor, the mayor should serve without compensation; and a mayor is not estopped from claiming compensation by his declarations during the canvass for the office that if elected he would not claim compensation.

MANDAMUS for salary. The opinion states the case.

John Ruhm and Samuel Watson, for relator.

J. C. Bradford and A. S. Colyar, for Nashville.

COOPER, Sp. J. The relator in this case, T. A. Kercheval, is the present mayor of the city of Nashville. He seeks by *mandamus* to compel the city council to place the amount of compensation, or salary, claimed by him as mayor for 1886, in the budget for the expenses of the city for said year, and also to compel the comptroller of the city treasury to place his name on the list of the city creditors, and to issue warrants on the city treasurer for the amounts claimed to be due him as mayor for October and November, 1885.

His honor the Circuit judge was of opinion that the relator was entitled to the relief sought, and directed peremptory writs of *mandamus* to be issued accordingly. From this judgment defendants, or some of them, have prosecuted an appeal in error to this court.

The record indicates that the relator was elected mayor of Nashville, on October 8, 1885, and inducted into office on the 13th day of the same month. It was suggested in argument, by defendant's counsel, that the proceedings in the court below were in some respects irregular. But it is sufficient to say, as to this, that the course pursued in that court was in substantial compliance with the practice approved or suggested in the case of *State v. Board of Inspectors*, 6 Lea, 18.

The real grounds of defense relied upon in the demurrer and answer, are these: 1. That the city council, by ordinance adopted in May, 1885, declared that upon the expiration of the term of office of the then mayor, that the mayor of the city should not receive any compensation, that this ordinance is valid, and therefore the present incumbent is not entitled to any compensation. 2. That if this ordinance is for any reason invalid, still the relator is estopped from claiming and receiving any compensation, because in his canvass for said office he declared that if elected he would not claim any compensation for his services as mayor. The determination of these questions decides the controversy. As to the first of these questions, on March 21, 1883, the legislature of the State passed an act (the same being approved March 26, 1883), which repealed the charter of the city of Nashville, said act taking effect on the second Thursday of October, 1883. On the same day the legislature passed another act (which was approved March 27, 1883), providing "for the creation and organization and defining the powers of municipal corporations embracing territories of cities having a population of 36,000 and upward, according to the federal census of 1880, whose charters have been abolished." This act also took effect on the second Thursday of October, 1883, and under it the present city government of Nashville is organized, and had its birth at an election held on the day the act went into effect. An examination of the provisions of this act is necessary to the determination of the validity of the ordinance already referred to. Indeed, an inspection of the entire act is needful to obtain a just comprehension of its intention, spirit and purposes. It has been argued for the defendants that this act is a general law, and that it should not be tested by the same rules of construction that are applied to special charters. To this view we cannot accede. While the act is in one sense a general law, it is, for all practical purposes, the charter of Nashville, and it is so designated in the city code recently

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compiled. It is the grant of power. From it the city government derives its life and vigor; and to its restrictions and limitations the municipality is subject. Under this grant of authority, the agents and officials of the city have no more power than they would have if it were a special charter instead of a general law, and as to the rules of construction of special charters there has been no contention in the argument.

By the terms of this charter act a city council of ten members is provided for, and the powers of this council are largely, if not chiefly, legislative in their character. It also provides for a mayor, whose duties are chiefly, but not wholly, executive. The act further provides for the creation of a board of public works and affairs of three members, and the duties of this board may be said to be chiefly administrative. So the act fairly divides the city government into three departments, and these may be conveniently classified as the legislative, executive and administrative departments, and in the act the rights and duties of each are specifically pointed out.

The judicial department of the act treats as a subsidiary matter.

The system of city government devised by this charter act seems to have been thoroughly considered, and there appears to be no good reason why, in practice, it should not prove to be a successful form of government. There are thus three departments, all important and each having its sphere of action, and the checks and balances provided for are well suited to prevent mal-administration. As said, the powers of each department are designated, and one is not allowed to encroach upon the domain of the co-ordinate departments. Such is the general scope and purpose of the charter act, and the intention of the legislature, as to the powers of the co-ordinate departments, seems to be clearly manifested.

Sections three to eight, both inclusive, relate to the city council, and the last sentence of section eight of said charter act is this: "Councilmen shall receive no compensation." Here it is clearly expressed that the city's officers in this department of the government were to serve without pay. Whether this provision is a wise one experience alone will demonstrate. But the duties of the council, while important, are not necessarily onerous, after the government is once fully organized and a system of ordinances adopted. A majority make a quorum for business, and hence by arrangement, each councilman can be absent from four-tenths of the meetings of the council if he so desires.

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The ninth section enumerates many of the duties of the mayor, and near the end of that section occurs this clause: "The compensation of the mayor shall be \$2,400 per annum, and may be changed by ordinance, but not during his term of office." The twenty-sixth and twenty-seventh sections of said act provide for the election of the board of public works and affairs by the city council, their qualification, etc., and the twenty-eighth section is this: "That the members of said board of public works and affairs shall devote their time and attention to the duties of their office, and shall not engage actively in any other business. The compensation of said board of public works and affairs shall be fixed by the mayor and city council prior to their election; provided, that the amount of such salaries shall be uniform and subject to such change as the mayor and city council may from time to time, in their judgment, expressed by city ordinances, deem advisable, and their salaries shall not be changed during their term of office."

The ordinance adopted in May, 1885, by the city council, is in these words: "After the expiration of the term of the present mayor of the city, the mayor shall serve without compensation." Is this ordinance valid, or is it *ultra vires*? The relator insists that the power given the council in the ninth section of the charter act, and quoted, to change the compensation of the mayor does not confer, or imply the authority to take away all compensation; while the defendants maintain the converse of this proposition.

In determining this question, we must keep in mind, among other things, the fact that this charter act applies only to cities of a population of "36,000 and upward." Millions of property are affected by the administration of the city government. For this reason the legislature, it is to be inferred, would be more cautious in its grant of power. A liberal grant of power to a village might not prove disastrous, while the same grant of power to a city might ultimate in financial ruin. This act bears evidence that it was drawn with great care. It expressly provides, that councilmen shall receive no compensation. If it had intended that the mayor and the board of public works and affairs should receive no compensation, it certainly would have been so expressed. If the act had intended to leave this question of the compensation of the officers of the executive and administrative departments to the discretion entirely of the council, and leave the council to determine whether they should receive any compensation at all for their onerous ser-

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vices, it certainly would have contained a clear provision to that effect. The withholding of pay from the officers of the legislative department of itself indicates an intention that the officers of the other two departments should receive compensation; and this intention is emphasized by the provisions in sections nine and twenty-eight relative to compensation. The office of mayor is created by the charter act, as is the office of councilman. The mayor and councilmen are chosen by popular vote. The board of public works and affairs are chosen by the council, but their salaries are to be fixed before they are chosen. Why does the act fix the mayor's salary at \$2,400 till changed by the council? The fact that it was so fixed for the first term shows that the legislature intended he should have compensation; and the act fixes an amount adequate to secure respectable capacity. It was not left to the council after elected, lest an amount unsatisfactory should be fixed. By providing a salary for the first term, and till changed by the council after the city was organized, we have an expression from the legislature as to the meaning and intention of the act, to-wit: That the mayor should receive compensation. If the city council can deprive the mayor of compensation, there appears no reason why it may not also refuse compensation to the board of public works and affairs. The council is empowered to change, in like manner, the pay of said board. This board is required not to engage actively in any other business, but if the mayor does his duty under this act he will not have time to engage actively in any other business. If the council can deprive the mayor and the board of public works and affairs of all compensation, then it has the power to so emasculate those departments of the government that all vigor and efficiency will be gone, and the government of the city will be left, practically, in the hands of the council. In such event the system of government provided by the charter act will be subverted and the intention of the legislature thwarted. It cannot be that so dangerous a power was intended to be lodged in the council.

It is urged however by defendants that as the power of the council to change the compensation is expressly given, it can reach the same end as that sought in said ordinance by reducing the mayor's salary to a nominal amount, and that this being true demonstrates the correctness of the position that the council has the power to abolish the salary altogether—that it is useless to deny this plenary power, when the council can change the salary from

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\$2,400 to one dollar. In the case of the State at the relation of *Halsey v. Gaines*, 2 Lea, 322, Judge McFARLAND says of an argument of this character: "This is an argument often resorted to, and no argument is more fallacious." We may enlarge the suggestion. When officials are advised of the fact that their power over a given matter is not absolute, but that they have a trust to discharge, a court will never presume that they will abuse that trust. If the city council should ever attempt to abuse their trust, it will be time enough then to decide whether their action, in the exercise of a clearly vested power, is final and not subject to revision by any tribunal—whether the only remedy left is an appeal to the electors at the ballot box. It might be that an ordinance reducing the mayor's salary to a nominal amount would be unreasonable and void; or that an ordinance increasing it to an exorbitant amount would likewise be invalid. The one-hundredth part of the salary fixed by the charter act is twenty-four dollars. One hundred times the amount so fixed is \$240,000. Defendants argue that the council can reduce the compensation to as small a sum as twenty-four dollars. If so, can they not increase it, if they see fit, to \$240,000? But as stated, it is not necessary to decide this point.

As already intimated, an inspection of said act will show that the duties of the mayor are numerous and important. The office is by no means a sinecure. One of his important duties is to see that all the laws and ordinances of the city are faithfully executed. Without pay, he cannot be expected to give much attention to the affairs of the city. The law will not permit an officer's salary to be taken for his debts, because without salary he would not be able to discharge his trusts. Human ingenuity cannot devise a system of laws so perfect but that unscrupulous and designing men can evade and pervert them, and no safeguard is equal to constant watchfulness and supervision. Any one at all familiar with the administration of public affairs knows the necessity of constant scrutiny, and the act under consideration imposes important supervisory duties upon the mayor. What is here suggested is not said with reference to the policy or impolicy of the ordinance referred to, but these considerations can be legitimately looked to in ascertaining the intention of the legislature. That the council may have been influenced by the best of motives, of course does not affect the question at issue.

It is also insisted by the defendants that the relator knew, when

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he offered himself for the position of mayor, that the salary had been abolished, and is therefore estopped. The ordinance abolishing the salary being void, it cannot affect the legal rights of the relator. *Burch v. Baxter*, 12 Heisk. 603.

There are other reasons that might be adduced why said ordinance is void, but we deem it unnecessary to give them. And in the view we have taken, it is unnecessary to pass on the question whether said ordinance was unreasonable or oppressive. A grant of charter powers, as a general rule, is strictly construed. A power exercised under a municipal charter must be expressly conferred, or fairly implied from the language or purposes of the act. We have not found or been furnished with any precedent in point, but under the admitted principles of construction, we hold that the ordinance of May, 1885, depriving the mayor of compensation, was beyond the power of the city council and void.

It is also insisted that the relator is not entitled to compensation, because while a candidate he promised he would serve without compensation if chosen to the office. This statement is set up in some of the answers, while the answer of four of the defendant councilmen says, in substance, that this allegation is untrue. This allegation in avoidance was demurred to by the relator, said demurrer was sustained by the Circuit judge, and as the answer, besides this, set out no other or further ground of defense than had been already determined on the demurrer to the petition, on motion, the peremptory writ was awarded.

The Circuit judge properly sustained the demurrer to the answer. Even if it be true that the relator, while a candidate, told the electors that he would serve without compensation if elected, this is not a contract, nor is he estopped thereby. If a candidate makes such a promise to the voters, it is only binding in the forum of conscience. It may impose upon him a moral, but no legal obligation. If an office have a salary attached to it, it is even against public policy to permit such agreements. This has been determined in numerous cases, some of which have been cited in argument. 36 Wis. 213; 72 Mo. 13; 53 Iowa, 346; 20 Pick. 428.

Such an agreement by a candidate might be ground on which to remove him from office after election, but is no legal reason to prevent his receiving the salary of the office.

The judgment of the Circuit Court will be affirmed and the cause remanded to the end that the peremptory writs be issued.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

INHABITANTS OF BROOKLINE V. SHERMAN.

(140 Mass. 1.)

Municipal corporations — title to furniture of fire-engine house.

A room in a town fire-engine house had been supplied with furniture for the use of the firemen, purchased by contributions from the town, from citizens and from members of the company, by prize money gained in a contest with another company, and by assessments on the members. The furniture was used for ten years by the succeeding companies, until the members of the existing company removed it, divided it among themselves, and disbanded. The members were appointed by the town engineers. *Held*, that the town could replevy it. (*See note, p 486.*)

REPLEVIN. The head-note states the case. The plaintiff had judgment below.

A. O. Brewster, for defendant.

C. A. Williams, for plaintiff.

C. ALLEN, J. The defendant has no valid ground of exception to any of the rulings made at the trial. The enginemen were a fluctuating and temporary body, and did not constitute a corporation, and were not endowed with legal succession. They did not

Inhabitants of Brookline v. Sherman.

own the property provided for the use of the company. They could not sell it for the purpose of dividing the proceeds among themselves, nor could they distribute the property itself among themselves. The town provided the engine and engine-house, and paid the enginemen. The property in controversy was for the use of such persons as should be members of the engine company for the time being. It could not have been contemplated that each member upon withdrawing from time to time from the company should be entitled to assert a private ownership to a share of the furniture. This would defeat the very object for which it was provided. Whoever gave money for this purpose, whether members of the company or citizens at large, must have given it with the understanding that the furniture should remain in the room, and that it should be appropriated for the use and benefit of the company as it might be constituted from time to time. The purpose was to aid and improve the efficiency of the organization, by furnishing a convenient and attractive room for its use as a body and not by making a gift of property to the individuals who composed the company at that or any other particular time, which they might distribute among themselves, or sell for their individual emolument. It is more reasonable to consider that the title to the furniture was vested in the town, which owned the building and the engines, and which paid the enginemen and the general expenses of maintaining the fire department. Whatever was given was given in law to the town, for the purposes named. It is unnecessary here to consider whether the town took it on a trust which could be enforced. Whether it did or not, it would be equally entitled to recover. But the legal title must be somewhere. It is not in the individuals who compose the company. The company had no corporate existence. And on the facts stated, we are satisfied that the legal title is in the town.

In *Perry v. Stowe*, 111 Mass. 60, no support is found for the claim of the defendant. The town was not a party to the suit, but the action was brought by the enginemen who stayed in the company against a person who bought the furniture from those who withdrew; and it was held that the former could maintain replevin for the furniture. The circumstances were quite similar to those in the present case, though not identical in all respects. The remark in the opinion of the court, that the furniture "was the property of the engine company," means that the engine

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company, that is the remaining members of it, had property enough in the furniture to entitle them to maintain replevin against the withdrawing members. It does not mean that the company had an absolute title as against the town. No such question was under consideration.

Exceptions overruled.

NOTE BY THE REPORTER.-- In *Bisbee v. Fadden*, 140 Mass. 6, it was held, that if the members of a fire-engine company of a town take and detain, in order to keep it from the succeeding company, property used in furnishing the hall occupied by the company, and for the general purposes of the company, which has been bought from the general funds of the company, and has passed from year to year to the succeeding company, the members of the new company may maintain replevin for the property without a demand, although at the time of the original taking they had not been appointed enginemen.

BENTON V. TRUSTEES OF CITY HOSPITAL.

(140 Mass. 13.)

Negligence — dangerous premises — trustees of hospital.

A city hospital was maintained by appropriations from the city, donations and fees, and governed by a board of trustees. A person visiting the building on business was injured by reason of the unsafe condition of a stairway, caused by the negligence of the superintendent. *Held*, that the board of trustees was not liable.

ACTION for personal injuries. The head-note states the facts. The defendant had judgment.

C. G. Keys, for plaintiff.

T. M. Babson, for defendant.

FIELD, J. If the trustees are regarded as the trustees of a public charity, then the case falls within the decision in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; s. o., 21 Am. Rep. 129. There is no evidence of negligence on the part of the trustees as a corporation. There is evidence of negligence on the part of the superintendent, but there is no evidence that he was not a

* See *Perry v. House of Refuge* (68 Md. 20), 52 Am. Rep. 495.

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proper person to be appointed superintendent. But we think that this is a hospital maintained by the city, with such aid as may be derived from donations, and the sums received from paying patients, and that the trustees are in a sense managing agents only in maintaining the hospital, subject to the laws and to the ordinances of the city. The donations, if any are ever made, must be used according to the terms of the gift. The money appropriated by the city of Boston must be used according to the terms of the appropriation.

The sums received from paying patients are by the ordinance to "be credited to the account of the hospital," and are, as stated in the exceptions, "used in the support of the hospital." All the funds are used for the purpose of maintaining the hospital in accordance with the statute of 1858, chap. 113. The corporation of the Trustees of the City Hospital of the city of Boston has in fact no property. The statute of 1858, chap. 113, is a special, and not a general statute, and it is permissive, and not imperative; but these distinctions would not render the city liable for negligence in the management of the hospital, as has been shown in *Tindley v. Salem*, 137 Mass. 171; s. c., 50 Am. Rep. 289. The trustees are a body created for the performance of a duty which under the authority of the statute the city of Boston has assumed for the benefit of the public, and from the performance of which no profit or advantage is derived either by the trustees or the city. The trustees as a corporation are no more liable for the negligence of their officers and agents than the city would be. The case is governed by the principles declared in *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 832.

Exceptions overruled.

WHITE V. DUGGAN.

(140 Mass. 18.)

Bond — conditional delivery in blank — alteration by principal.

One who executes as surety a bond in blank, and entrusts it to his principal to be filled in and delivered, is bound by the instrument as delivered to the obligee, although the principal, before delivery, inserts a larger penal sum than that agreed upon between him and the surety, the obligee having no notice, from the face of the bond or otherwise, of the unauthorized act of the principal. (*See note, p 440.*)

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ACTION on a bond. The opinion states the case. The plaintiff had judgment below.

J. L. Eldridge, J. E. Cotter and E. G. Pratt, for defendants.

J. F. Wiggin & B. M. Fernald, for plaintiff.

HOLMES, J. This is an action on a probate bond. The following facts are relied on as a defense by the sureties. Having signed another bond which turned out to be wrong in form, they signed this one in blank at their principal's request, and upon his representation that the penal sum in the former bond (\$2,000) was satisfactory, and that the new bond was to be for the same amount. The principal filled out the blank with a larger penal sum, and delivered the bond, but subsequently told the sureties that it was in the penal sum of \$2,000, which they believed until after this action was brought.

It does not appear in terms that the representation that the penal sum of the former bond was satisfactory was false, or that the judge of probate did not require the larger sum for the first time when the second bond was offered. And if the bill of exceptions should be taken at all strictly against the defendants, it would seem that whatever expectations they may have entertained as to the action of the Probate Court when they handed the blank bond over to their principal, they handed it to him to be filled in as the Probate Court might require, being chargeable with knowledge that the time for final action upon the matter had not yet come. In this view of the facts, the only question is whether the case is governed by *Burns v. Lynde*, 6 Allen, 305, and more especially by *Basford v. Pearson*, 9 Allen, 387, and we are of opinion that it is not. In *Burns v. Lynde*, a deed had been delivered executed in blank, and a parol authority was relied on to make valid a subsequent filling in of the blanks in the absence of the grantor. The filling in of the blanks stood on the same footing as signing and sealing, and could be authorized only by a power under seal. *Basford v. Pearson* applied the same principle, without further discussion, where a deed was signed and sealed by husband and wife, and he subsequently filled in the blanks and made alterations, with the knowledge of the grantee, in the absence of the wife and by her parol authority, and then delivered the deed. It may be somewhat hard

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to reconcile the latter case with those decisions which sustain the filling in of blanks in the presence of a party who has previously signed and sealed, even after delivery, on the ground that this is equivalent to a new delivery. For the reason given imports that an authorized delivery will cure a defect of authority in the writing, which seems indisputable. 2 Bl. Com. 307; Perkins, pl. 130. But we do not understand that it was intended to deny this principle, as it is expressly recognized by the same judge in *Burns v. Lynde*, 6 Allen, 310. At all events, when the grantee or obligee is ignorant of the order in which the several parts of the instrument are written, and the delivery to him is duly authorized, he is entitled to assume that the instrument was so written as to bind the grantor or obligor from whose control it comes. We should add, that in this Commonwealth at least we cannot question for an instant that the authority to deliver merely may be given by parol. This does not seem to have been doubted in *Basford v. Pearson*. See *Parker v. Hill*, 8 Metc. 447; *Foster v. Mansfield*, 3 Metc. 412; s. c., 37 Am. Dec. 154. To admit a doubt on this point would shake many titles.

If we are to interpret the bill of exceptions more favorably for the defendants than we have done thus far, and to take it that they only authorized the bond to be filled in with a penal sum of \$2,000, and even if we take the further step of assuming that limitation to have carried with it the understanding between them and the principal that they only assented to a delivery if the bond was filled in as they expected it to be, we are still of opinion that no defense is made out. We are aware that there are several cases more or less opposed to our conclusion. *People v. Bostwick*, 32 N. Y. 445; *Ohio v. Boring*, 15 Ohio, 507; *United States v. Nelson*, 2 Brock. 64; *Preston v. Hull*, 23 Grat. 600; s. c., 14 Am. Rep. 153, and cases cited. But we think that the prevailing tendency, both in this State and elsewhere has been in the direction we have taken. *Thomas v. Bleakie*, 136 Mass. 568; *Butler v. United States*, 21 Wall. 272; *Dair v. United States*, 16 Wall. 1; *South Berwick v. Huntress*, 53 Me. 89; *State v. Peck*, 53 Me. 284; *State v. Pepper*, 31 Ind. 76; *Millett v. Parker*, 2 Metc. (Ky.) 608.

These decisions are generally put on the ground of estoppel. It has been debated in England whether, and under what circumstances, there could be an estoppel by negligence. *Swan v. North British Australasian Co.*, 2 H. & C. 175. And it has been admitted

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that there might be, in a supposed case hardly as strong as this: *Taylor v. Great Indian Peninsula Ry.*, 4 DeG. & J. 559, 574. A specialty deriving its validity from an estoppel *in pais* is perhaps somewhat like Nebuchadnezzar's image with a head of gold supported by feet of clay. But if the case is properly put on that ground, then as was pointed out in *Commonwealth v. Pierce*, 138 Mass. 165; s. c., 52 Am. Rep. 264, the difference between intent and negligence in a legal sense is ordinarily nothing but the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence, or class of consequences, will follow from a certain act, and it follows that the question when an estoppel will arise is simply one of degree. If on the other hand the true question is the scope of the principal's authority to deliver the bond, bearing in mind that an authorized delivery will cure defects in the writing of the bond, that the authority to deliver may be by parol, and that the scope of authority may be greater than is wished by the obligor, ostensible authority being actual authority, then the question is equally one of degree, depending on the particular circumstances, just as the same question is in tort. *Quacumque via*, then all that we have to do is to deal with the case before us, and it will serve no useful purpose to consider whether, if the surety had intrusted the bond to the principal, with no authority to deliver it at all, or whether, if he had handed a blank sheet of paper, with his signature and seal at the bottom, to an agent, directing him to deliver it filled out one way, and he had filled it out in an entirely different way and delivered it, such cases would fall on one or the other side of the line. We are of opinion, that when a bond such as this is intrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the Probate judge to insert a penal sum larger than the surety directed, and of his doing so, is so obvious and so near, that the surety must be held to take the risk of his principal's conduct, and is bound by the instrument as delivered, although delivered in disobedience of orders, if as here, the obligee has no notice from the face of the bond or otherwise, of the breach of orders. To hold otherwise would be to disregard the habits of the community.

Exceptions overruled.

NOTE BY THE REPORTER. — See *Nash v. Fugate*. 32 Gratt. 595, s. c., 34 Am. Rep. 780. The like doctrine was held in *Bangs v. Bangs*, 41 Hun, 41.

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The court said: "We think the defense cannot be maintained. The defendants' counsel relies mainly upon the case of *People v. Bostwick*, 48 Barb. 9; s. c. affirmed, 82 N. Y. 445. It has been said in the Court of Appeals, that the decision in that case may well be questioned. *Russell v. Freer*, 56 N. Y. 67, *per* GROVER, J., p. 71. The case has been severely criticised in other States. *Deardorff v. Foresman*, Ind., 5 Am. L. Reg. [N. S.] 539; *State v. Potter*, 68 Mo. 212; s. c., 21 Am. Rep. 440; 16 Am. L. Reg. [N. S.] 170. Decisions adverse to it have been made by the Supreme Court of Maine. *New York County M. F. Ins. Co. v. Brooks*, 3 Am. L. Reg. [N. S.], 399 *State v. Peck*, 53 Me. 284; in Indiana, *State v. Pepper*, 31 Ind. 76; s. c., 12 Am. Rep. 637; in Kentucky, *Millett v. Parker*, 2 Metc. 608; and by the Supreme Court of the United States. *Dair v. United States*, 16 Wall. 1. We are not aware that the case has been cited approvingly by our Court of Appeals, except in the recent case of *Whitford v. Laidler*, 94 N. Y. 145; s. c., 46 Am. Rep. 131, where it was referred to in support of a rule very different from that on which the defense rests in the case before us, namely, that it is competent for the parties to a contract to agree upon the method of its execution and delivery, and if any material stipulation relating thereto remains unperformed by them, the instrument will not take effect as their contract. In that case, an instrument purporting to be a contract between the plaintiff of one part, and thirteen individuals therein named of the other part, was signed by the plaintiff and by some but not all of the thirteen, and by the mutual consent of all signing, was left with another person, not a party to it, to procure the signatures of the other parties named therein, and upon his accomplishing that object he was instructed to deliver the paper to the town clerk. *Held*, that until that condition was performed, the writing was incomplete and unexecuted. *Bostwick's* case was also cited with approval by DAVIS, P. J., in *Grimwood v. Wilson*, 31 Hun, 215. That was an action on an undertaking given on an appeal from a judgment to the General Term, signed by the appellant and one surety only, the statute requiring two. Code of Pro., § 335. The surety defended on the ground that he signed upon the condition that another surety should be procured. Judge DAVIS said in his opinion that the plaintiff must be presumed to know that the law required two sureties, and if he, of his own motion, chose to waive that requirement, and to accept the instrument with one surety, he ought at least to have been sure that the single surety had consented to accept the increased responsibility thrown upon him by the absence of another surety. DANIELS, J., concurred on the ground that as the undertaking in the form in which it was filed was insufficient to create a stay, and the plaintiff therefore was deprived of no right, nor delayed in the collection of his judgment, by the giving of the undertaking, the failure to comply with the conditions imposed by the defendant signing it was a defense. Justice DAVIS cited, in connection with *Bostwick's* case, *Benton v. Martin*, 52 N. Y. 570, and *Bookstaver v. Jayne*, 60 N. Y. 150, which hold that an instrument not under seal may be delivered upon conditions, the observance of which, as between the parties, is essential to its validity, and that may be regarded as the extent to which the court, in *Grimwood v. Wilson*, intended to go.

"But whether or not the *Bostwick* case has been weakened as authority, the

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rule there laid down has not been extended beyond the facts of that case. The defense there was that the bond was signed upon the condition that it should be signed also by one Dickinson, which was not done. The bond was delivered to the proper officer, and the fact appears that he was told at the time that Dickinson would call and sign the bond, and he replied that it was good enough as it was 43 Barb. 12. The importance of that fact was commented on by HARDIN, J., in *Richardson v. Rogers*, 50 How. Pr. 403, and was regarded by him as distinguishing the *Bostwick* case from the one with which he was dealing. No such fact can properly be held to exist in this case, since the plaintiff, being a minor, was incapable of receiving or being charged with notice, to her prejudice.

"We feel at liberty therefore to hold that the rule laid down in *Bostwick's* case is not applicable here. The true rule by which this case is to be governed, we think, is that laid down, in substance, in many of the cases cited above, to wit, that where there is nothing upon the face of the paper indicating that other sureties were expected to become parties to the instrument, and no fact is brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in respect to that point, and to induce him, in the exercise of ordinary and reasonable caution and prudence, to make inquiry before accepting the security, the fault cannot be said to rest to any extent upon the obligee, and the failure to procure other sureties is no defense."

Where negotiations were made for the joint guaranty of a lease by several persons, and afterward, before the completion of the contract, one of the proposed guarantors withdrew from the proposed agreement, and notified the lessor, who thereupon accepted the lease as guaranteed by the others, without notifying them of the withdrawal of the proposed joint guarantor, he cannot enforce the guaranty against them. *Potter v. Groubeck*, Ill. Sup. Ct., June 12, 1886.

To same effect, *Singer Mfg Co. v. Drummond*, N. Y. Sup. Ct., April, 1886.

PHELPS V. SULLIVAN.

(140 Mass. 36.)

Deed — in blank — agency to fill and deliver.

A mortgagee of land executed an assignment of the mortgage, in blank as to the assignee, and orally authorized his son to find a purchaser, write in his name as grantee, and deliver the assignment. The son did so, the assignee not knowing that the son was acting as agent in any respect except to deliver the assignment. *Held*, that the assignment was valid.*

* To same effect. *Field v. Stagg* (52 Mo. 534), 14 Am. Rep. 485, and note, 489; *Campbell v. Smith* (71 N. Y. 26), 27 Am. Rep. 5; *Swarts v. Ballou* (47 Iowa, 188), 29 Am. Rep. 470; *Contra, Upton v. Archer* (41 Cal. 85), 10 Am. Rep. 266.

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FORECLOSURE. The opinion states the case.

G. H. Stevens, for demandant.

S. Bancroft, for tenant.

MORTON, C. J. This is a writ of entry to foreclose a mortgage. The demandant claims under a mortgage from the tenant to Nathan P. Pratt, and an assignment thereof by said Pratt. It appeared at the trial, that said Pratt executed and acknowledged the assignment in blank, and orally authorized his son, when he could find a person to purchase the mortgage, to write in the name of such person as the grantee, and to deliver the assignment. The son negotiated the mortgage to one Simonds, filled in his name as grantee, and then delivered to him the assignment. He afterward reported what he had done to Nathan P. Pratt, who replied, "It is all right." The only question presented by the bill of exceptions is whether upon these facts there was a valid assignment to Simonds.

The tenant contends that the assignment was invalid, relying upon the rule of the common law that an authority to an agent to execute a deed or other specialty must be under seal. But we do not think the case is governed by this rule. Where a deed purports to be executed by an agent, or where the person with whom an agent is dealing knows that he is acting as agent, it may be that such person must see to it at his own peril that the agent has legal authority. But in this case the assignment did not disclose, and Simonds did not know that the son was acting as agent in any respect except to deliver the assignment. It is settled that an authority to deliver a deed or other specialty may be by parol. *Parker v. Hill*, 8 Metc. 447. A deed takes effect from its delivery; and it may well be held that the authority to deliver, which may be oral, is an authority to deliver the deed in the condition in which it is when delivered, if there are no circumstances of suspicion to put the grantee upon inquiry. When a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized, and delivers it to an innocent grantee without knowledge, we think the grantor is estopped to deny that the deed as delivered was his deed. Otherwise he may by his voluntary act enable his agent to commit a fraud upon an innocent party. Whether if the agent

violates the instructions in filling the blanks, the grantor would not in like manner be bound, we do not discuss, as it is not involved in this case. To hold that such deeds are invalid, because the authority to fill the blanks is not under seal, would tend to unsettle titles, and would be mischievous in its results. Few deeds are written by the grantors. Most are written by scriveners, and a grantee to whom a deed is delivered has no means of determining whether the body of the deed was written before or after the signature was affixed. It would be very dangerous to allow titles to be defeated by parol proof that a deed, without suspicion on its face, duly signed and sealed by the grantor, which he authorized to be delivered, was in fact written in some part after he executed it, by an agent having only oral authority. We think a person taking such a deed in good faith has the right to rely upon it; and that the grantor cannot be permitted to aver that it is not his deed. *White v. Duggan*, 140 Mass. 18.

The cases of *Burns v. Lynde*, 6 Allen, 305, and *Basford v. Pearson*, 9 Allen, 387, are distinguishable from this case. In *Burns v. Lynde*, the deed had been delivered to the grantee signed in blank, and he himself, after the delivery, filled the blanks. In *Basford v. Pearson*, a deed had been signed by the defendant in which the name of the grantee was left blank. The deed contained the covenant against the claims of "all persons claiming by, through, or under us, but against none others." The grantor gave it to her husband to be delivered. He by parol authority from his wife, but in her absence, and with the knowledge of the grantee, inserted the name of the grantee, and erased the words which limited the covenant, so as to make it a general covenant of warranty against all persons. He then delivered the deed. If he had made these material alterations by parol authority from his wife, and without the knowledge of the grantee, a different question would have been presented, more nearly resembling the question before us.

Upon the facts presented in the bill of exceptions, we are of opinion that the assignment to Simonds was valid; and therefore that the ruling ordering judgment for the tenant was erroneous.

Exceptions sustained.

Hinckley v. Germania Fire Insurance Company

HINCKLEY V. GERMANIA FIRE INSURANCE COMPANY.

(140 Mass. 33.)

Insurance — fire — bowling-alley — expired license.

The owner of a bowling-alley and pool-table procured an insurance against fire on the same and the other articles used in connection therewith, on the 15th of March, 1883. The policy was conditioned to be void "if gun-powder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law." At the time the policy was issued he was duly licensed to keep such alley and table, but the license expired on the 1st day of May, 1883. He continued the business, without license, until the last week in June, 1883, when he discontinued it. A loss by fire occurred on the 6th August, 1883. *Held*, that he might recover the policy.

ACTION on a fire insurance policy. The head-note states the case. The defendant had judgment below.

J. M. Day & T. C. Day, for plaintiff.

M. Williams & C. A. Williams, for defendant.

C. ALLEN, J. The report does not state the grounds upon which the ruling rested, that the plaintiff was not entitled to recover. The defendant in its brief, relies on various objections, which we have considered.

[Minor point omitted.]

It is then urged that after the license had expired, the plaintiff kept the insured property in violation of law, from May 1, 1883, till the last week in June, 1883. The policy was dated March 15, 1883, and the license then existing expired on May 1, 1883. The fire occurred on August 6, 1883, and it was conceded that there was no illegal use of the property after the last week of the preceding June, at which time the plaintiff ascertained that his license would not be renewed. The defendant rests its objects on two grounds: first, that the illegality and criminality of the plaintiff's act in respect to the insured property vitiate the policy by operation of law, independently of any express provisions contained in the policy; and secondly, that under a provision of the policy the right to recover is taken away. The authorities cited in support of the first proposition do not support it.

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In *Kelly v. Home Ins. Co.*, 97 Mass. 288, the policy was on intoxicating liquors, which at the time of the insurance, and thereafter to the time of the loss, were intended for sale in violation of law. The policy never attached. There was never a moment when the liquors were not illegally kept; and all that the case decides is, that goods so kept at the time when the policy issued, or at the time of the loss, cannot be the subject of a valid insurance.

In *Johnson v. Union Ins. Co.*, 127 Mass. 555, the facts were similar. The policy was on billiard tables, balls, cues, etc., kept without a license at the time the policy was issued, as well as at the time of the loss.

The ground of the decision in both of the above cases is stated to be, "that the object of the assured in obtaining the policy was to make their illegal business safe and profitable, and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the contract was illegal and void, and the policy never attached." The same facts existed in *Lawrence v. National Ins. Co.*, 127 Mass. 557, n.

In *Cunard v. Hyde*, 2 El. & El. 1, the cargo which was the subject of insurance was partly loaded on deck, in violation of law, and while in that condition was totally lost.

In the present case, the plaintiff had a license at the time when the policy issued, and the policy therefore was valid when obtained. If it be assumed, without discussion, that the policy would cease to be operative during the time when the property was kept in use without a license, the question remains, whether such temporary illegal use of the property has the effect to avoid the policy altogether, or merely to suspend it during the continuance of such illegal use. There is nothing in the case to show that it was found, as a matter of fact, that the plaintiff, at the time of taking out the policy, intended to make it cover any illegal use of the property. He may have expected to get his license renewed; or failing in that, he may have intended to close the place where the property was used, as according to his own testimony, in point of fact he did. Under this state of facts, we are of opinion, that the temporary use of the property without a license, if un contemplated at the time of taking out the policy, would not of itself, and as matter of law, render the policy void during the whole of the rest of the time which it was to run. If there were any special or peculiar reasons why such absolute invalidity should be declared, they should be made to appear.

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In the absence of such reasons, such temporary and un contemplated illegal use of the property should not be visited with so severe a penalty as the absolute avoidance of the policy. It does not appear that the defendant was or could be in any way injuriously affected thereby, after such illegal use had ceased. It has the benefit of the temporary suspension of the risk, without any rebate of the premium. There is no hardship to the defendant in requiring it to show an actual injury, or else to avail itself of the clause in the policy giving the defendant a right to cancel it upon notice and a return of a ratable proportion of the premium.

There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. "The doctrine that the risk may be suspended and again revive without an express provision for the purpose, seems to be within the strictest juridical principles." 1 Phil. Ins., § 975. Accordingly, temporary unseaworthiness, if the ship has become seaworthy again, will not defeat the policy. 1 Phil. Ins., § 734. So as to other stipulations, as for instance, that of neutral character and conduct. 1 Phil. Ins., § 975. And in *Worthington v. Bearse*, 12 Allen, 382, it was held, on great consideration, by this court, that if the assured in a marine policy temporarily parts with his interest in the property insured, and afterward buys it in again, the policy will revive, if there are no express provisions making it void, and there is no increase of risk. As between the insurer and the assured, there is no reason why the former should be allowed to avail himself of a temporary illegal use, like that which existed in the present case, unless it can also be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected; and as a matter of general policy, it does not seem reasonable to impose upon the assured so severe a consequence as the forfeiture of his policy, in addition to the penalty of \$100, which the legislature has considered adequate as the maximum punishment for his offense against the public. Pub. Sts., Ch. 102, § 111.

It is further contended by the defendant, that however it might be under the general rule of law, the policy contained a provision making it void. In the standard form of policy established by the legislature, which was used in the present case, the matters avoiding a policy are enumerated. Omitting matters not here material, the provision is: "This policy shall be void * * * * if the insured shall make any attempt to defraud the company, either

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before or after the loss,—or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law,—or if camphene, benzine, naphtha or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal-oil may be used for lighting.”

In this Commonwealth, under the statutes for the regulation of trade, and providing for licenses and municipal regulations of police, there are a great many articles which, in a certain sense, may be said to be “subject to legal restriction.” Dogs, fish, nails, commercial fertilizers, hacks and horses in cities, may be referred to as examples. It may well be questioned whether, under the maxim *noscitur a sociis*, the clause in the policy above quoted ought not to be limited in its application to other articles of a character similar to gunpowder, the keeping of which may have a natural tendency to increase the risk. It would be rather a strained construction of this clause to hold that a policy should be void because an unlicensed dog was kept upon the premises; and yet such a dog, being subject to legal restriction, would be kept in a manner different from that allowed by law. It would not be sensible to give to these words the broadest construction of which they are susceptible.

But irrespectively of this consideration, it is not the necessary meaning of the word “void,” as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy which has once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phil. Ins., § 975, it is said: “After it [the policy] has begun, so that the premium is become due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty upon the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred * * *

And there does not appear to be any good reason why, in the absence of all fraud and of all prejudice to the underwriter, the same doctrine should not be applicable to express stipulations in the nature of warranties, or conditions, unless, by the circumstances or the express provisions of the policy, such application is excluded.” In accordance with this doctrine, a provision in a policy that it

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should be void, and be surrendered to the directors of the company to be cancelled, in case of alienation of the property by sale or otherwise, was held to mean that it should be inoperative for the time being; and the assured, upon regaining title, after a sale of the property by him, was held entitled to recover. *Lane v. Maine Ins. Co.*, 12 Me. 44. So where a policy provided that, "in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent [*i. e.* of the company], this policy shall from thenceforth be void and of no effect," it was held that after such sale the policy revived upon the assured acquiring again the title, and holding it at the time of the fire. *Power v. Ocean Ins. Co.*, 19 La. 28.

The same rule of construction has been applied to provisions against other insurance. *Obermeyer v. Globe Ins. Co.*, 43 Mo. 578; *New England Ins. Co. v. Schettler*, 38 Ill. 166; *Mitchell v. Lycoming Ins. Co.*, 51 Penn. St. 402. The court in Illinois has gone so far as to apply it also to a provision against an increase of risk, which ceased before the loss. *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295; *Ins. Co. of North America v. McDowell*, 50 Ill. 120, 129.

Without at present going beyond what is called for by the circumstances of the present case, we are of opinion, that assuming the temporary use of the property insured without a license to come within the prohibition of the policy, in the clause above quoted as to gunpowder or other articles subject to legal restriction, yet that clause is not to receive such a construction as to prevent the policy from reviving after such temporary use has ceased.

[Minor point omitted.]

New trial granted.

LAMB V. OLD COLONY RAILROAD COMPANY.

(140 Mass. 79.)

Railroads—frightening horse by firing up engine.

The plaintiff was driving his horse along a highway parallel and adjacent to a railroad, and the horse was frightened by smoke from the engine of a train coming in the opposite direction, and the plaintiff was injured in consequence. The engine had been necessarily freshly fired up, which increased the smoke. *Held*, that the railroad company was not liable.

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ACTION for personal injuries. The opinion states the case. The defendant had judgment below.

J. G. Abbott and G. G. Sawyer, for plaintiff.

J. H. Benton, Jr., for defendant.

W. ALLEN, J. As the plaintiff was driving his horse along a highway parallel to and adjoining the defendant's railroad, his horse was frightened by the smoke from the engine of a train passing on the railroad in a direction opposite to that in which the plaintiff was going, and the plaintiff was injured in consequence. After the plaintiff's evidence was all in, the court ruled that there was no evidence for the jury; and the plaintiff excepted to the ruling. The evidence is not stated in the exceptions, but a full report of it is annexed and referred to in them. It does not appear upon what ground the ruling was placed, or what questions of law were intended to be presented. It is not a case where a single question of fact involving a single proposition of law is presented upon evidence stated in the exceptions; but all the testimony applicable to distinct questions of fact, and involving in its application distinct propositions of law, is sent to us to examine and discover upon what question and for what reason it was ruled, or may be now held, that the evidence was insufficient to prove the plaintiff's case. Nearly the whole of the bill of exceptions is taken up with statements of what the plaintiff claimed the evidence tended to prove. No ruling was asked or given in relation to this. As the ruling and exception are to the sufficiency of the evidence, the question of the sufficiency of the facts claimed by the plaintiff to be proved is not before us. The ruling was, that upon the whole evidence the plaintiff could not recover. We think that the ruling was right, because the evidence was not sufficient to prove that the defendant was negligent.

The defendant had a right to run its trains on its railroad adjoining the highway, and was not responsible to travellers on the highway for the consequences of noise, vibration, or smoke caused by the prudent running of its trains. *Favor v. Boston & Lowell Railroad*, 114 Mass. 350; s. c., 19 Am. Rep. 364. The smoke which frightened the plaintiff's horse was occasioned by "firing up" the engine,—that is, mending the fire, or adding coal to it,—the ordi-

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nary effect of which is to occasion the emission for a short time of very black, dense smoke from the smoke-stack. The plaintiff contended that there was evidence that it was practicable to run the train for the whole distance where the railroad adjoined the highway without firing up; and that the act of firing up on the stretch of railroad adjoining the highway was unnecessary for the ordinary running of trains, and exposed travellers to an unnecessary danger, and was therefore negligent, or might be found to be so by a jury. Without considering the proposition of law involved, we think the court below might properly have ruled that there was no evidence to sustain the proposition of fact. The evidence showed that frequent firing up was necessary for the practicable running of trains. The exceptions state that "the plaintiff also offered evidence which he claimed tended to prove that an engine drawing a train of cars could be run from half a mile to a mile without firing up, and that if any space of half or three quarters of a mile was known in advance where it was not desirable to fire up, it was entirely feasible, and within the power of the engineer or fireman, to so arrange his firings as not to make it necessary to fire up in such a space, and to make such arrangements without interfering with the working of the engine, and that a quarter of a minute or a few seconds' difference in the time of firing up could make no material difference in the running of the engine." The evidence was uncontradicted, that the railroad and highway were adjoining each other for more than a mile; that it would not be practicable to fire up immediately before entering upon that space; and that it would be necessary, in the ordinary running of trains, to fire up somewhere upon that space. Under such circumstances, the firing up near the highway, and the smoke occasioned by it, were ordinary incidents of running the train, as much so as the smoke when not firing, or the noise and vibration caused by the cars; and they were not of themselves evidence of negligence.

The plaintiff argues, that even if it was necessary to fire up when running near the highway, it was not necessary to do so at the particular point where he was; and that the defendant was negligent in not observing him, and avoiding firing up when it would endanger him. There was no evidence that the defendant's servants knew that the plaintiff was on the highway, but there was evidence that they would have seen him if they had been on the lookout for travellers on that part of the highway. If it was

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their duty to be on the watch for persons on the highway, and to avoid firing up when near them, there was evidence of negligence. The act of firing up, like that of sounding the whistle or blowing off steam, is one necessarily incident to the running of trains, not continuous, but occasional, and so to some extent capable of being regulated in its use; and it may be negligent to do it in places where there are likely to be persons who may be endangered by it, and where its use can be avoided, as at stations and highway crossings and in short portions of the railroad near a highway. But we think that the right to fire up an engine at any particular place must depend upon the character of the place, and not upon whether a person happens to be near at the moment. If the defendant had a right to fire up its engine somewhere within the space where its road adjoins the highway, the firing up there is one of the ordinary and necessary incidents of running the train, against which travellers on the highway must guard themselves. The lawfulness of the act cannot depend upon whether a traveller happens to be at such a distance from the engine that he will not be endangered by the smoke caused by it, or in such a position that he cannot be seen by the fireman or engineer. If it is their duty to see one traveller outside the location of the railroad, it is their duty to see how many travellers are there, and to observe the position, direction and speed of each, the speed of the engine, the state of the atmosphere, the direction and force of the wind, the character of the coal used, and other circumstances, which may determine whether all travellers are, and will continue to be until the smoke is dissipated, in such positions that their horses will not be affrighted by it. Being under no obligation to watch for travellers on the highway, the defendant could not have been guilty of negligence in not seeing and avoiding the plaintiff.

Exceptions overruled.

Gibbens v. Gibbens.

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(140 Mass. 102.)

Will — vested remainder.

A will provided: "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of a parent." *Held*, a vested remainder.

BILL for the construction of a will. Previous to the clause quoted in the head-note, the will provided: "I give to my wife, Mary R. Gibbens, the use of all my household furniture, plate, pictures, books, and utensils; also all the family stores, which shall be in the house at the time of my decease, and destined for family maintenance. All such articles as are not consumed in the use, and shall remain in existence at my wife's marriage or decease, shall then go to my children, they to share the same equally."

A. D. Foster, for the children of the first marriage.

E. H. Bennett, for the children of the second marriage.

O. ALLEN, J. The only clause of the will under which any question arises is the following: "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children the issue of a deceased child standing in the place of the parent." Other portions of the will are referred to merely as they may aid in showing the intention of the testator in using the above language.

While the meaning of the testator is certainly open to some doubt, which has been shown with much ingenuity and force in the argument, we are of the opinion, on the whole, that the case falls within the general rule, that a vested remainder will be held to have been intended, in the case of a devise to the testator's children, unless there is something sufficient to show the contrary. There are no words of contingency as to the children who shall take. The devise is general, to the testator's children, the issue of a deceased child standing in the place of the parent. The will does not say that the interest of any one of them shall cease in case of his or her death. In the devise, the meaning of which is immediately

under consideration, the testator does not even insert the word "then ;" that is, that "the estate shall then go to and be equally divided among my children." This word is only used in the earlier clause, providing that such articles of furniture, and other specific articles, as are not consumed in the use, and shall remain in existence at his wife's marriage or death, shall then go to his children. But in all the cases referred to in the argument where stress was laid upon such a use of the word "then," as showing that the remainder was to be held contingent rather than vested, it was accompanied with words of survivorship; as in *Olney v. Hull*, 21 Pick. 311, where the words were, "should my wife marry or die, the land then shall be equally divided among my surviving sons;" in *Thompson v. Ludington*, 104 Mass. 193, where the remainder was given "to such of my children as shall then be living;" and in *Smith v. Rice*, 130 Mass. 441. The argument from the use of the word "then" in the earlier clause does not materially aid in the consideration of the meaning of the clause immediately to be determined, and it is certainly open to much doubt whether the earlier clause would not bear the same meaning if the word "then" were omitted. In *Denny v. Kettell*, 135 Mass. 138, the word "then" was not inserted, but the words were, "all the residue of said trust fund in equal portions, to my surviving nephews and nieces." These being plain words of survivorship, the only question was to what period of time they should be referred; and it was held, in view of all the phraseology of the will, that they should be referred to the period of distribution. That decision throws no light upon the present case, which falls rather within the rules favoring vested remainders as declared in *Blanchard v. Blanchard*, 1 Allen, 223, and *Abbott v. Bradstreet*, 3 Allen, 587.

An argument in favor of contingency is drawn from the use of the words, "the issue of a deceased child standing in the place of the parent." It is urged that such issue, if there were any, would take at all events; that the parent could not have disposed of his or her share, to their exclusion; and that therefore the interest of the parent was not an absolute vested one. It is contended, on the other hand, that the interest of Harriet was a vested remainder, subject only to be divested by her death in the life-time of her mother, leaving issue. It is true that there may be such a thing as a vested interest which is determinable upon the happening of a contingency. *Blanchard v. Blanchard*, *ubi supra*. But in the present case we do

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not find it necessary to consider whether Harriet's interest was liable to be divested by the birth and survivorship of issue, or not. It is quite as natural and probable to infer that the words above quoted were used for the purpose of showing clearly that the testator did not intend the devise to lapse, in the case of the death of one of his children, leaving issue. Words to the effect that the issue of the deceased children shall take by right of representation are not uncommon in wills, when strictly speaking they are entirely unnecessary; and the use of so familiar and common an expression does not carry with it a strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised. *Pike v. Stephenson*, 99 Mass. 188. *Darling v. Blanchard*, 109 Mass. 176; *McArthur v. Scott*, 113 U. S. 340, 381; 1 Jarm. Wills (5th ed. by Bigelow), 870.

It is further contended that inasmuch as the gift in the will embraces personal as well as real estate, it ought more readily to be inferred that the testator intended that his children should take only a contingent interest, and some of the earlier Massachusetts cases countenance this view. *Dingley v. Dingley*, 5 Mass. 535; *Denny v. Allen*, 1 Pick. 147; *Emerson v. Cutler*, 14 Pick. 108, 115; *Rich v. Waters*, 22 Pick. 563. In later cases however the above decisions have been overruled or questioned; see *Wright v. Shaw*, 5 Cush. 56, 60; *Abbott v. Bradstreet*, 3 Allen, 590; *Bowditch v. Andrew*, 8 Allen, 339, 342; and gifts over the real and personal property, at the expiration of widowhood, to the testator's children, have usually been held to convey a present vested interest to the children.

On the whole, looking at all parts of the will, considering the repetition, in a later portion, of substantially the same idea in different phraseology, in view of the entire absence, in either of these provisions, of any words of contingency, such as "my children then surviving," and of the fact that nothing was wanting to put the children in full possession except the mere efflux of time, regarding also the provision, that in case of remarriage of the testator's wife, the bulk of the income of both real and personal estate was at once to go to his children, we are brought to the conclusion that the children took vested interests; and that the share of Harriet L. Gibbens passed by her will. See also *Poor v. Considine*, 6 Wall. 458; *McArthur v. Scott*, 113 U. S. 375; *Parker v. Converse*, 5 Gray, 336.

Decree accordingly.

MORSE V. CURTIS.

(140 Mass. 112.)

Mortgage — recording — priority.

The owner of land mortgaged it to A., and afterward to B., who knew of the earlier mortgage, but recorded his own mortgage first. After both mortgages were recorded, B. assigned his mortgage to C., who had no actual notice of the mortgage to A. *Held*, that C. had precedence.

WRIT of entry. The opinion states the case. The plaintiff had judgment below.

P. H. Cooney, for demandant.

E. S. Mansfield, for tenant.

MORTON, C. J. This is a writ of entry. Both parties derive their title from one Hall. On August 8, 1872, Hall mortgaged the land to the demandant. On September 7, 1875, Hall mortgaged the land to one Clark, who had notice of the earlier mortgage. The mortgage to Clark was recorded on January 31, 1876. The mortgage to the demandant was recorded on September 8, 1876. On October 4, 1881, Clark assigned his mortgage to the tenant, who had no actual notice of the mortgage to the demandant. The question is which of these titles has priority.

The same question was directly raised and adjudicated in the two cases of *Connecticut v. Bradish*, 14 Mass. 296, and *Trull v. Bigelow*, 16 Mass. 506. These adjudications establish a rule of property which ought not to be unsettled, except for the strongest reasons.

It is true, that in the later case of *Flynt v. Arnold*, 2 Metc. 619, Chief Justice SHAW expresses his individual opinion against the soundness of these decisions; but in that case the judgment of the court was distinctly put upon another ground, and his remarks can only be considered in the light of *dicta*, and not as overruling the earlier adjudications.

Upon careful consideration, the reasons upon which the earlier cases were decided seem to us the more satisfactory, because they best follow the spirit of our registry laws and the practice of the profession under them. The earliest registry laws provided that no

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conveyance of land shall be good and effectual in law "against any other person or persons but the grantor or grantors, and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in manner aforesaid." Stat. 1783, ch. 37, § 4.

Under this statute, the court at an early period held that the recording was designed to take the place of the notorious act of livery of seisin; and that though by the first deed the title passed out of the grantor, as against himself, yet he could, if such deed was not recorded, convey a good title to an innocent purchaser who received and recorded his deed. But the court also held that a prior unrecorded deed would be valid against a second purchaser who took his deed with a knowledge of the prior deed, thus engrafting an exception upon the statute. Reading of Judge TROWBRIDGE, 3 Mass. 575. *Marshall v. Fisk*, 6 Mass. 24.

This exception was adopted on the ground that it was fraud in the second grantee to take a deed, if he had knowledge of the prior deed. As Chief Justice SHAW forcibly says in *Lawrence v. Stratton*, 6 Cush. 163, the rule is "put upon the ground, that a party with such notice could not take a deed without fraud, the objection was not to the nature of the conveyance, but to the honesty of the taker; and therefore if the estate had passed through such taker to a *bona fide* purchaser, without fraud, the conveyance was held valid."

This exception by judicial exposition was afterward engrafted upon the statutes, and somewhat extended, by the legislature. Rev. Stats., ch. 59, § 28; Gen. Stats., ch. 89, § 3; Pub. Stats., ch. 120, § 4. It is to be observed that in each of these revisions it is provided that an unrecorded prior deed is not valid against any persons except the grantor, his heirs and devisees, "and persons having actual notice" of it. The reason why the statute requires actual notice to a second purchaser, in order to defeat his title, is apparent. Its purpose is that his title shall not prevail against the prior deed, if he has been guilty of a fraud upon the first grantee; and he could not be guilty of such fraud, unless he had actual notice of the first deed.

Now in the case before us, it is found as a fact that the tenant had no actual knowledge of the prior mortgage to the demandant at the time he took his assignment from Clark; but it is contended that he had constructive notice, because the demandant's mortgage was recorded before such assignment.

It was held in *Connecticut v. Bradish, ubi supra*, that such record was evidence of actual notice, but was not of itself enough to show actual notice, and to charge the assignee of the second deed with a fraud upon the holder of the first unrecorded deed. This seems to us to accord with the spirit of our registry laws, and with the uniform understanding of and practice under them by the profession.

These laws not only provide that deeds must be recorded, but they also prescribe the method in which the records shall be kept and indexes prepared for public inspection and examination. Pub. Stats., ch. 24, §§ 14-26. There are indexes of grantors and grantees, so that in searching a title, the examiner is obliged to run down the list of grantors, or run backward through the list of grantees. If he can start with an owner who is known to have a good title, as in the case at bar, he could start with Hall, he is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance the former owner becomes a stranger to the title, and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require the examiner to follow in the indexes of grantors the names of every person, who at any time, through perhaps a long chain of title, was the owner of the land.

We do not think this is the practical construction which lawyers and conveyancers have given to our registry laws. The inconveniences of such a construction would be much greater than would be the inconvenience of requiring a person, who has neglected to record his prior deed for a time, to record it, and to bring a bill in equity to set aside the subsequent deed, if it was taken in fraud of his rights.

The better rule, and the one the least likely to create confusion of titles, seems to us to be, that if a purchaser, upon examining the registry, find a conveyance from the owner of the land to his grantor, which gives him a perfect record title completed by what the law, at the time it is recorded, regards as equivalent to a livery of seisin, he is entitled to rely upon such record title, and is not obliged to search the records afterward, in order to see if there has been any prior unrecorded deed of the original owner.

This rule of property, established by the early case of *Connecticut v. Bradish*, ought not to be departed from, unless conclusive reasons therefor can be shown.

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We are therefore of the opinion, that in the case at bar the tenant has the better title; and according to the terms of the report, the verdict ordered for the demandant must be set aside, and a
New trial granted.

TAFT V. FISKE.

(140 Mass. 280.)

Trial—comment of counsel on answer.

The plaintiff's counsel may not comment to the jury upon the discrepancy between the original and the amended answer and argue therefrom that the defense is fictitious.

ACTION against sheriff. The opinion states the case. The plaintiff had judgment below.

T. G. Kent, for plaintiff.

W. A. Gile, for defendant.

DEVENS, J. The case at bar is an action against the executrix of the late sheriff of Middlesex for the neglect and default of one of his deputies. The declaration alleges that a writ was placed in the hands of the deputy for service, which was in favor of the plaintiff and against one Travis, on which he was directed to attach property or take a sufficient bond; that Travis had in his possession enough personal property subject to attachment to have secured the claim of the plaintiff; and that by the neglect of the officer to make a substantial attachment the plaintiff lost his debt.

As we are of the opinion that the exception which relates to the conduct of the case before the jury must be sustained, and thus there must be a new trial, we have not deemed it desirable to consider the other exceptions, as it is not probable that they will be again presented in the same form in which they are now offered.

The defendant's original answer denied the allegations of the plaintiff's declaration. Before the trial, she filed an additional answer, setting up an attachment under a special order issued while the action was pending; alleging that all the property of Travis which could have been attached on the original writ had been

attached thereon, and retained until such attachment was dissolved by operation of law.

At the trial the defendant sought to prove that the instructions given to the deputy, which were indorsed on the writ, were superseded and waived. Being met by the objection that this defense was not open under the answer as it then stood, she was permitted to file an amendment thereto, setting forth this allegation. The instructions to the jury required them to find for the defendant, if this allegation was proved; and the verdict for the plaintiff necessarily disposes of this contention. The correctness of this instruction is not questioned.

The plaintiff's counsel, in closing, argued that the filing of this amendment during the trial showed that the defense so pleaded was a "put up" defense, not relied on when the original answer was filed; that its filing during the trial should "be taken into account; that not one word was said about all this in the original answer;" that the fact that this defense was not set up "until the trial was partly through, was to be considered," with other arguments of a similar nature.

While this argument was being made, the defendant's counsel privately called the attention of the presiding judge thereto, who declined to interrupt the plaintiff's counsel. At the close of the argument, the defendant formally called the attention of the judge thereto, and requested an instruction, which was refused, that the fact that the defendant amended her pleadings during the trial, setting up an additional or more specific defense, was not a subject of comment, and that "the fact of such amendment should not influence or affect their judgment upon the fact of the case." To this instruction the defendant was entitled in substance. The answer is the statement of his case by a party. It is not to be deemed evidence on the trial, but consists of "allegations only whereby the party making them is bound." Pub. Stat., ch. 167, § 75.

The plaintiff concedes that the contents of an answer are not the subject of comment; but contends that the fact of its filing may be. This is to draw too nice a distinction. The fact of its filing was perfectly unimportant in the case at bar, except as connected with the contents of the amended answer. In *Phillips v. Smith*, 110 Mass. 61, the original declaration was read and commented on as evidence contradictory of the plaintiff's testimony, and of the addi-

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tional declaration on which the plaintiff finally sought to recover; and it was held that this was irregular. The case at bar does not differ in substance. The plaintiff here, by means of the answer first filed and that subsequently relied on, endeavored to show that the amended answer was a "put up" defense. The force of this argument depended upon a comparison of the evidence afforded by the two answers.

It would be a serious embarrassment to that liberal amendment of pleadings contemplated by our statutes, if a party availing himself of the leave in this respect granted by the court could only do so by subjecting himself to the imputation that his new form of statement, by its difference from that previously made, showed that he presented a simulated case. When the plaintiff objected to the evidence offered by the defendant, it was the right of the latter to apply to the court for leave to amend her answer, without invoking a ruling upon the question thus raised, and without subjecting herself to any imputation by reason that she had not before set forth the allegations made in the amendment.

The original statement of a party's case is often hurriedly prepared, with imperfect information of the facts, and sometimes under misapprehension of the law. New facts are revealed at the trial, and new views of the law applicable to them are suggested. It would be unjust, if in a closing argument the counsel could be allowed to compare the answer originally made with that finally relied on, without an investigation of all the circumstances under which the original answer was made. Yet such an investigation would be obviously impossible. To permit counsel thus to comment after the evidence has been concluded, and when no opportunity for explanation remained, or indeed could ever be given, would often cause an entirely different effect to be attributed to the legal statements of a defense from that which they should properly bear.

The plaintiff urges that the defendant's counsel had no right to remain silent during his address to the jury, and that it was his duty then to have interposed. To have interrupted the plaintiff's counsel while making his argument was only to provoke altercation, especially after the defendant's counsel had satisfied himself that he would not be sustained by the court. To the refusal of the court then to interrupt the counsel the defendant has alleged no exception, and as the matter was not then brought to the attention

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of the opposing counsel, perhaps could not have so done. But when, at the close of the argument, the matter was brought to the attention of the court in the presence of the counsel, the defendant was entitled, in substance, to the request made, unless at least the plaintiff's counsel then formally withdrew the comments made by comparison of the two answers, and disavowed any intention to ask a verdict by reason of them.

Exceptions sustained.

HASTINGS V. LOVEJOY.

(140 Mass. 281.)

Contract — to reduce rent — consideration.

An executed oral agreement by a lessee with his lessor to take a partner in his business for three years, and borrow money and put into the business, provided the lessor would reduce the rent already reserved, forms a good consideration for the lessor's promise to reduce the rent.

ACTION for balance of rent. The head-note and the last paragraph of the opinion show the case. The plaintiff had judgment below.

G. A. Torrey and T. F. Nutter, for defendant.

A. E. Pillsbury, for plaintiffs.

C. ALLEN, J. While recognizing and giving effect to the rule of law, that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained existing debt of a larger amount, because such agreement is without consideration, courts have nevertheless often declared that the rule is not to be extended beyond its precise import, and especially if a consideration for such agreement is found to exist, of which the law can take notice, that courts will not inquire into its adequacy. *Langdon v. Langdon*, 4 Gray, 186; *Brooks v. White*, 2 Metc. 283; *Simmons v. Almy*, 103 Mass. 33. The question what will constitute a sufficient consideration for such agreement has been discussed in many cases. See *Fitch v. Sutton*, 5 East, 230; *Brooks v. White*, *ubi supra*; *Perkins v. Lockwood*, 100 Mass. 249; *Train v. Gold*, 5

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Pick. 380; *Warren v. Skinner*, 20 Conn. 559; Metc. Cont. 192; 1 Smith Lead. Cas. (8th Am. ed.) 644.

It is also now well settled, that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether. *Cummings v. Arnold*, 3 Metc. 486, 489; *Holmes v. Doane*, 9 Cush. 135; *Goodrich v. Longley*, 4 Gray, 379, 383; *Emery v. Boston Ins. Co.*, 138 Mass. 398; *Ross v. Nugent*, 5 B. & Ad. 58.

This rule in Massachusetts has been held applicable to a case where the original contract fell within the operation of the statute of frauds. *Cummings v. Arnold*, *ubi supra*; *Stearns v. Hall*, 9 Cush. 31. But in the present case there is no question under the statute of frauds. In reference to contracts under seal, it was formerly held, especially in England, that they could not be thus varied. But in the United States the tendency of judicial decision has been to apply the same rule in this respect to sealed instruments as to simple contracts. In *Munroe v. Perkins*, 9 Pick. 298; s. c., 20 Am. Dec. 475, the plaintiff, by an instrument under seal, agreed to erect a building at a fixed price, which was not an adequate compensation, and having done part of the work, refused to proceed; but upon a parol promise by the defendant that he should be paid for his labor and materials, and should not suffer, he went on and finished the building, and it was held that he was entitled to recover in assumpsit upon the parol promise. The court says: "The parol promise, it is contended, was without consideration. This depends entirely on the question, whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration." In *Mill Dam Foundery v. Hovey*, 21 Pick. 417, it was held that the time of performance of a sealed agreement to make certain plane-irons within one year might be extended by a new agreement afterward entered into between the parties, not under seal, but upon a sufficient consideration. In *Blasdell v. Souther*, 6 Gray, 129, 151, it was said by Chief Justice SHAW, in general terms, "We suppose there is no doubt that a

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valid oral contract may be made upon the basis of a pre-existing contract, either by specialty or by an unsealed written instrument, modifying, changing and altering the terms of the written agreement." See also *Barker v. Troy & Rutland Railroad*, 27 Vt. 766; *Lawrence v. Davey*, 28 Vt. 264; *Fleming v. Gilbert*, 3 Johns. 528; *Langworthy v. Smith*, 2 Wend. 587; s. c., 20 Am. Dec. 652; *Lattimore v. Harsen*, 14 Johns. 830; *Stryker v. Vanderbilt*, 1 Dutch. 482; *McGrann v. North Lebanon Railroad*, 29 Penn. St. 82; *Cooke v. Murphy*, 70 Ill. 96; 1 Smith Lead. Cas. (8th Am. ed.) 666.

In the present case we are of opinion that it was legally competent for the defendant to prove, as a defense to the plaintiff's action for the rent, that after the delivery of the lease the plaintiffs, for a good consideration, entered into an oral agreement that for the future the rent should be reduced; and that the defendant's testimony, and his offer of proof, in respect to the plaintiffs' alleged agreement in the fall of 1877, were sufficient, if believed, to warrant the jury in finding that the plaintiffs were not entitled to recover the amount so agreed to be abated. Agreeing to take in a partner for the ensuing three years, and to borrow the sum of \$40,000 and put the same into the business, provided the rent should be reduced, and actually fulfilling that agreement in consequence of the plaintiff's promise to reduce the rent, and continuing the business under these circumstances for three years, constituted a change of position on the part of the defendant, which might be of advantage to the plaintiffs, and also of detriment to the defendant, provided the plaintiff's promise should not be kept. *Train v. Gold*, 5 Pick. 385; *Hubbard v. Coolidge*, 1 Metc. 84, 92; *Peck v. Requa*, 13 Gray, 407; *Rollins v. Marsh*, 128 Mass. 116; *Hinckley v. Arey*, 27 Me. 362; *Moore v. Detroit Locomotive Works*, 14 Mich. 266.

New trial granted.

Dahill v. Booker.

DAHILL V. BOOKER.

(140 Mass. 308.)

Mortgage — chattel — conversion by third person — seizure by mortgagee.

A chattel mortgagor sued a third person for conversion of the mortgaged property. Subsequently the mortgagee seized the property under the mortgage, sold part of it, and transferred another part to the defendant. The mortgagor made a second mortgage of the property pending the action. *Held* (1) that the making of the second mortgage was not an abandonment of the cause of action, but (2) the seizure by the mortgagee should be considered in mitigation of damages.

TROVER. The head-note states the case. The plaintiff had judgment below.

J. A. Aiken, for defendant.

F. L. Greene, for plaintiff.

HOLMES, J. This was an action of tort in the nature of trover. The defendant put in evidence to disprove the conversion. It also appeared that one Wheeler, a mortgagee of the goods, took possession of them, nearly a year and a half after this action was begun, for breach of condition, and transferred all but certain articles to the defendant to pay him for storage of the same for the previous year. Wheeler did not file notice in the town clerk's office of his intention to foreclose until some time afterward, and within sixty days of the trial, so that the foreclosure was not then complete. "The defendant asked the court to instruct the jury that the taking of the property by Wheeler for breach of the condition of his mortgage was an application of the property for the benefit of the plaintiff, and should be considered by the jury in mitigation of damages, and that the plaintiff was entitled to damages only for the taking of the property and its detention up to the time it was taken by Wheeler for breach of condition of the mortgage. The court declined so to rule," and the defendant excepted.

The instructions requested embodied more or less accurately familiar propositions of law, and unless the transfer from Wheeler to the defendant took the case out of their operation, they should have been given in substance. For apart from that transfer, the

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property necessarily came back to the plaintiff, or was applied to his use, as the result of Wheeler's taking. See *Kaley v. Shed*, 10 Metc. 317. If the plaintiff redeemed, he regained his possession, which of course would go in mitigation of damages, although after action brought. See *Moon v. Raphael*, 2 Bing. N. C. 310; *Hammer v. Wilsey*, 17 Wend. 91. On the other hand, if the mortgage was foreclosed, the property went in satisfaction of the plaintiff's debt, and thus was applied to his use by his consent irrevocably given in the mortgage. *Pierce v. Benjamin*, 14 Pick. 356, 361; s. c., 25 Am. Dec. 396; *Squire v. Hollenbeck*, 9 Pick. 551; s. c., 20 Am. Dec. 506. See *Higgins v. Whitney*, 24 Wend. 379. It was not suggested that there was any diminution in the value of the property between the times of the conversion and of Wheeler's taking, so that we need not consider whether the second ruling requested would have been quite accurate in form, if that question had arisen. The sum paid to regain possession by redeeming is not to be treated as such a diminution. The liability to pay this sum was independent of the conversion, and was not like a reward paid to recover the goods in consequence of the defendant's conduct, as in *Greenfield Bank v. Leavitt*, 17 Pick. 1; s. c., 28 Am. Dec. 268. See *Cutting v. Grand Trunk Railway*, 13 Allen, 381, 388.

The case is not affected by the transfer from Wheeler to the defendant. The plaintiff's possession and right of possession were put an end to by the breach of condition and Wheeler's seizure. Under such circumstances, it is settled that a mortgagor cannot maintain trover for a subsequent sale of all the mortgaged goods together by the mortgagee. Such a sale does not of itself import a repudiation of the mortgage, or determine the title under it. *Landon v. Emmons*, 97 Mass. 37. *Wells v. Connable*, 138 Mass. 513. See further *Halliday v. Holgate*, L. R., 3 Ex. 299; *Donald v. Suckling*, L. R., 1 Q. B. 585, 617; *Mulliner v. Florence*, 3 Q. B. D. 484. It is true that in this case the goods seem to have been separated, and a portion retained by the mortgagee, although the distinction left open in *Landon v. Emmons* was not adverted to in argument, and does not appear to have been before the mind of the parties, so that the bill of exceptions is somewhat obscure upon this point. But we do not think that this fact, if it be a fact, without more, can change the result. Such a separation may make the redemption more difficult when the plaintiff desires to redeem, which he does not seem to have done in this case. But we think

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that it would be going too far to say that this, in and of itself, necessarily amounted to a repudiation of the mortgage and mortgage title, if indeed it is possible to repudiate a vested legal title in like manner as a simple bailment may be repudiated, it is said, by acts inconsistent with its terms. 2 Roll. Abr. 556, pl. 9. *Commonwealth v. James*, 1 Pick. 375, 386.

This is not a case where the goods being worth more than the mortgage debt, a foreclosure sale purporting to be under the power is made of a portion sufficient to satisfy the debt, and then the residue is returned to the hands of the wrong-doer. Such a case might present different questions from those dealt with here.

The fact that the defendant was reinstated in possession by Wheeler's transfer to him cannot affect the rule of damages. For even on the extravagant supposition that for the purpose of preserving his claim against the defendant undiminished, the plaintiff should attempt to insist on redeeming without receiving back possession, the answer would be, that although it is a plaintiff's undoubted right to refuse to receive back converted goods from a defendant, if he prefers full damages (*Stickney v. Allen*, 10 Gray, 352), yet if he should attempt to exercise a right under the mortgage, the defendant would be entitled to decline to receive the money except upon the terms of the mortgage, and that it is as much the defendant's right to restore the goods as it is the plaintiff's to receive them, when the mortgage debt is paid. See *Warfield v. Fisk*, 136 Mass. 219, 220.

The plaintiff made a second mortgage after the date of the writ. The defendant asked the court to instruct the jury that this was an abandonment of any claim for damages, except for the taking of the property and its detention up to that time, and also that it "was an act inconsistent with the claim of the plaintiff that the property was converted, and should be considered by them on the question of conversion." The court rightly declined to rule as requested. As a previous mortgage would not affect the amount of damages recovered (*Cram v. Bailey*, 10 Gray, 87), we do not see why a subsequent one should operate as an "abandonment." If the word is to be taken literally, the transaction was *res inter alios*, and could not have had that effect. On the question of conversion, the mortgage, if it intended to prove any thing, tended to prove that the defendant was then in wrongful possession of the goods by its description of them as "now in my saloon * * * which

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William Booker occupies without right." But as the owner of chattels does not lose the right to sell or mortgage them by the fact that they are in the wrongful possession of another (*Hubbard v. Bliss*, 12 Allen, 590, and *The Brig Sarah Ann*, 2 Summer, 206, 211), his doing so does not tend to prove that they are not in such wrongful possession. Moreover the evidence was in, and the defendant, whatever he had a right to argue, could not require the judge to single it out for remark. *Littlefield v. Huntress*, 106 Mass. 121, 127; *Bugbee v. Kendrick*, 132 Mass. 349, 354.

Exceptions sustained.

ATTORNEY-GENERAL V. WILLIAMS.

(140 Mass. 329.)

Deed — covenant to keep passageway open — bay windows.

A bond for a deed of land given by the Commonwealth described the land as bounded by "a passageway sixteen feet wide," and referred to a plan showing a system of streets covering an extensive territory, with passageways for the accommodation of the houses on two streets, and for access to their rear entrances. The bond further provided, that buildings to be erected on the premises should not be used for stables or mechanical or manufacturing purposes, and that "a passageway sixteen feet wide is to be laid out in the rear of said premises, the same to be filled in by the Commonwealth, and to be kept open and maintained by the abutters in common." The obligee built a house up to the line of the passageway, and built bay windows from a point eight feet above the sidewalk, and extending from three to four feet into the passageway, to the top of his house, six stories high. *Held*, upon an information in equity by the attorney-general, that the passageway was to be kept open to the sky throughout its entire width and length, and that the abutters on the passageway between two cross streets could not, by agreement among themselves, discontinue so much of the passageway. (See note, p. 473.)

INFORMATION in equity to restrain the erection of bay windows.
The opinion states the facts.

H. N. Shepard, assistant attorney-general, for plaintiff.

E. R. Hoar and *F. A. Brooks*, for defendant.

C. ALLEN, J. The first question which we have considered is, whether an information in the name of the attorney-general can be

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maintained to enforce the stipulations in respect to the passageway. In *Attorney-General v. Gardiner*, 117 Mass. 492, it is declared that the Commonwealth, in devising the scheme of improvement of the back bay lands, acted in a twofold capacity, — as the proprietor of lands which it held and might sell, and as the sovereign power, authorized to lay out highways for the benefit of the public; and that in the latter capacity it might enforce these provisions and restrictions, against all persons bound by them, by an information in equity in the name of the attorney-general. It is suggested that there is a distinction between that case and the present in this particular, — that there the information was brought to enforce restrictions imposed against building on the front part of the lots bounding on the highway, for the benefit of the public, while here it is brought only in the interest of a few private owners of the adjacent property bounding on the passageway. But the Commonwealth properly reserved to itself the right to enter upon the premises by its agents, and at the expense of the party in fault, to remove or alter, in conformity with the stipulations, any building, or portion thereof, which might be erected on the premises in a manner or to a use contrary to the stipulations. Also by the Pub. Stats., ch. 19, § 5, in all cases where the Commonwealth has such right, all grantees under the deeds by which such right is reserved, and their legal representatives and assigns, may by proceeding in equity compel the board of harbor and land commissioners so to enter and remove or alter such building or portion thereof.

It does not, in this case, appear affirmatively that the Commonwealth has sold all of its land in the neighborhood of the premises in question, and that it has no direct pecuniary interest in enforcing the stipulations. But assuming the fact to be so, it still has a duty to perform in this respect. Moreover it may be said to have constituted itself a trustee for all the parties in interest, by the form of the stipulation, with the implied assent of each grantee who takes a deed containing it. In either aspect, it has such an interest and duty as to entitle it, by its proper officer, to sue in this court on behalf of the rights and interests of those who claim its protection.

The principal ground of objection to the maintenance of the information is, that the defendant has not infringed upon the stipulation referred to. Before considering this question in the light of the particular stipulation, it may be well to review some of

the principal authorities cited at the argument. The leading case upon this subject is *Atkins v. Boardman*, 2 Metc. 457; s. c., 37 Am. Dec. 100, where it was held that the owner of land, over which his grantor had reserved a passageway, might, under the peculiar circumstances of that case, lawfully cover such passageway with a building, if he left a space so wide, high and light, that the way was substantially as convenient as before for the purposes for which it was reserved. There, from the language of the reservation, construed in the light of the existing facts and circumstances, the right reserved was held to be that of "a suitable and convenient footway to and from the grantor's dwelling-house, of suitable height and dimensions to carry in and out furniture, provisions and necessaries for family use, and to use for that purpose wheelbarrows, hand-sleds, and such small vehicles as are commonly used for that purpose, in passing to and from the street to the dwelling in the rear, through a foot passage, in a closely built and thickly settled town." It was a use which was individual to the occupant of that house, and not for the public. It was limited to certain simple uses, connected with getting things into and out of the house. It is obvious that the rights of the single person entitled under such circumstances to a passageway are not necessarily identical with the rights involved in the present case.

In *Schwoerer v. Boylston Market Association*, 99 Mass. 285, the provision in the deed establishing the passageway declared that it should "not be subject to have any fence or building erected thereon;" and this was held to give a right to have the entire court or passageway kept open to the sky, for light, air and prospect, and every other accommodation and advantage which such an open court might furnish to an estate abutting upon it.

In *Brooks v. Reynolds*, 106 Mass. 31, the passageway was declared in the deed to be for light and air, and was always to be kept open for the purpose aforesaid; and this was held to give a right to the open and unobstructed passage of light and air from the ground upward, and throughout the length of the passageway.

The case of *Salisbury v. Andrews*, 128 Mass. 336, is more like the present case. There tenants in common had laid out their land in Boston with a passageway or court, upon both sides of which they had erected buildings fronting upon the way; and by a deed of partition of the property, they provided that the way "shall be left and always lie open for the passageway or court aforesaid,

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for the common use and benefit of both of said parties and their respective estates." It was held that the right of an owner under this deed was not simply a right of way, but a right to the use and benefit of an open court, extending as well to the light and air above as to actual travel upon the surface of the earth.

It is necessary now to look at the terms of the bond in which the stipulation relied on in the present case is contained, in order to see what it means. In the first place, it is to be borne in mind that the place in question is a part of a great scheme of improvement of waste land in a city, for streets and dwellings. The description of the land carefully defines the width and lines of the passageway: "running one hundred and twelve feet to a passageway sixteen feet wide; thence westerly on the line of said passageway; * * * also all that part of said passageway sixteen feet wide that lies southerly of its centre line, and between the easterly and westerly lines of said premises extended; reference being had to the plan accompanying the fifth annual report of the commissioners on the Back Bay." A reference to the plan shows a system of streets, covering an extensive territory, with passageways for the accommodation of the houses on two streets, and for access to their rear entrances. "Any building erected on the premises shall be at least three stories high for the main part thereof, and shall not in any event be used for a stable or for any mechanical or manufacturing purposes." There were also other provisions showing that dwelling-houses of a high class were contemplated. Afterward followed the particular stipulation relied on, "that a passageway sixteen feet wide is to be laid out in the rear of the premises, the same to be filled in by the Commonwealth, and to be kept open and maintained by the abutters in common."

It was contemplated that buildings might be erected on both sides of this passageway. Each owner might build up to the line of it. The defendant has done so, and has built bay windows from a point eight feet above the sidewalk, and extending from three to four feet into the passageway, to the top of his house, six stories high. If the opposite owner should do the same, the passageway between the buildings, extending upward from a point beginning eight feet above the surface of the ground, would be eight feet, instead of sixteen, in width. It would be half closed up, so far as light and air and prospect are concerned. And if this may be done, it is difficult to place any practical limit to what might be done in

this manner. The passageway was designed as a thoroughfare for the accommodation of many persons. In appearance, it is on the plan indistinguishable from a narrow street. It is connected at each end with broad and important streets. It was to be kept open. No gates could be put at the ends of it. It was to be "maintained," that is, kept in good order for use. Its width shows that it was designed for vehicles drawn by horses, as well as for travellers afoot. The supplies for all the houses on both sides of it, for its entire length, would be chiefly deliverable, and all refuse matter removable by its means. Thus we have a passageway of defined dimensions, in the rear of all the houses on two broad streets, designed for use by all who may have occasion to seek the rear entrances to any of the houses on either street,—a passageway available also for police purposes and for use in the extinguishment of fires,—a passageway which is to be maintained and kept open, and designed for horses and wagons, in a part of a large city which is designed to be wholly occupied by dwellings of a high class, to which air and light and prospect are not only desirable, but essential, in the rear as well as in the front, with no limitation to the use which may be made of it or of the persons by whom it may be used.

In view of these considerations, we think the language of the stipulation was designed to signify a separation of sixteen feet at least between the rear portions of the buildings abutting on the passageway. A passageway sixteen feet wide was not merely to be kept open at the ends, but open to the sky throughout its entire length, for the general convenience and benefit. It is easy to see that the rights of others would be lessened, upon any other construction. The opposite owner, who might not wish in like manner to build into the passageway, would have in the rear of his house a space just so much the narrower. The adjacent owner on the same side who did not wish to occupy a part of the passageway with his building, would have light, air and prospect cut off. The right themselves to occupy the passage in this manner would be no equivalent to owners who did not wish to build their houses so as to extend back to the line of it.

There is nothing in the facts proved at the hearing and reported to us which in any way controls the construction thus put upon the language of the stipulation. The result is, that a decree must be entered for the removal of the projections.

Decree accordingly.

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NOTE BY THE REPORTER. — In *Salisbury v. Andrews*, 128 Mass. 336, the obstruction complained of was a bridge across the court in question. In *Schworer v. Boylston Market Association*, 99 Mass. 285, the obstruction was a building extending across the court at the height of about sixteen feet from the ground.

See *Bybee v. State*, 94 Ind. 443; s. c., 48 Am. Rep. 173.

WHITE V. DITSON.

(140 Mass. 231.)

Executor and administrator — trust for charity in discretion — sale of land — liability of sureties.

A will gave the residue of the estate to the executor, "to be disposed of by him for such charitable purposes as he shall think proper." *Heid.*, that his sureties were liable for so much of the estate as was received by him and not so disposed of. Upon an executor's bond conditioned to account for "the proceeds of all his real estate that may be sold for the payment of his debts and legacies," the sureties are not liable for the proceeds of land sold by authority of the will, but not needed for the payment of debts and specific legacies.

ACTION on executor's bond. The opinion states the case.

E. M. Johnson, for plaintiff.

W. G. Russell & J. Fox, for defendant.

DEVENS, J. The defendants who were sureties on the bond of the late John P. Healy, an executor of the will of John Percival, having admitted a breach thereof, the case at bar has been referred to an assessor to report the facts, and is now before us upon a reservation of the questions of law raised upon the facts stated in his report, and in the subsequent agreement of additional facts by the parties.

It is not denied that Healy, as executor, paid all the debts, specific legacies, and funeral expenses of the testator. The first and most important inquiry is as to the responsibility of the sureties for that which came into his hands under the residuary clause of the will.

This is in the words following: "All the rest and residue of my

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property and estate, real, personal and mixed, of which I shall die seized, or to which I may be entitled at the time of my decease, I give, devise and bequeath to the said John P. Healy, to be disposed of by him for such charitable purposes as he shall think proper."

This clause is preceded by one which gave to Healy a sword and a portrait of the testator, to be disposed of "in such way and manner" as he might think "fit and proper." The earlier clause differs from that we are considering in the important respect that no restraint is placed upon the disposition Healy might make of the articles therein bequeathed, while the property bequeathed by the latter clause is "to be disposed of" by him for "charitable purposes," although the selection of the objects of the charity which should receive the bounty was left to Healy.

The word "charitable" has a distinct legal meaning, derived from the statute of 43 Eliz., chap. 4, from the construction given to it in the definition of its objects of charity, and from the application of the statute to other uses which are not included in those there enumerated, but which come within its spirit by analogy. While the gift to Healy is not, in terms, in trust, the object for which it is confided to the donee distinctly appears to be its distribution to charitable purposes. For this only it is intrusted to him. He took the gift for no purpose personal to himself, nor in any manner for his own use, and had no beneficial interest therein. It is not material therefore that the words "in trust" are not found in the terms of the bequest. *Nichols v. Allen*, 130 Mass. 211. *Schouler, Petitioner*, 134 Mass. 426.

While a bequest which could be applied to purposes other than charitable might be held too indefinite to be carried out, the limitation of its distribution to purposes well defined and deemed worthy of particular protection, even if various, would enable the court, were the fund still in the hands of the trustee, to compel him to execute this clause of the will by the selection of the charitable purposes to which the fund should be devoted. The testator has shown his intention to dispose of this gift for charitable purposes generally, and a confidence has been reposed in the trustee to make a selection of the objects of charity. If therefore the trustee proceeds in good faith, and with reasonable diligence, to divide and distribute such a legacy for purposes which could properly be called charitable, either by directly applying it to objects thereof, or transferring it to responsible societies or associations formed for

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such purposes, a Court of Chancery would not interfere with the exercise of his discretion. Should he refuse to do this, there would be no serious difficulty in compelling, by the proper agencies of such a court, the execution of the trust, and in preventing the fund from being misappropriated to selfish uses. *Saltonstall v. Sanders*, 11 Allen, 446; *Loring v. Marsh*, 2 Cliff. 469; 6 Wall. 337; *Marsh v. Renton*, 99 Mass. 132; *Attorney-General v. Gleg*, 1 Atk. 356.

Whether the power to select charitable objects was strictly limited to Healy, on account of the personal confidence reposed in him, so that if he had declined to accept the trust, or if he had deceased without completing the execution of it, it could not be executed by the intervention of the court, and the trust thus failing, the fund should go to the next of kin, — or whether, the testator having distinctly shown his intention that it should be devoted to charitable purposes generally, it should be held that the power of selection was attached to the trust, so that it might be executed through a trustee, who should carry into effect the controlling purposes of the testator under the supervision of this court, — is a question not necessary now to be discussed. *Loring v. Marsh*, *ubi supra*; *Fountain v. Ravenel*, 17 How. 369.

The first inquiry is as to the liability of the sureties. While Healy fully completed the administration of the estate by the payment of all debts, legacies and expenses, he settled no final account as executor, and did not, by any open and notorious act, discharge himself as such in the Probate Court by assuming to transfer the residue of the property to himself as trustee, or by any other act indicating an intention thereafter to hold the same for the purpose of the trust. The will gave to him two characters, those of executor and trustee; and the duties of the latter character were entirely distinct from and independent of those of the former. As actual payment cannot be made by one to himself, it has been held that where the same person is executor and trustee, he must give bond in his character of trustee before he can exonerate himself from his liability as executor. *Hall v. Cushing*, 9 Pick. 395; *Dorr v. Wainwright*, 13 Pick. 328; *Newcomb v. Williams*, 9 Metc. 525, 534; *Conkey v. Dickinson*, 13 Metc. 51; *Daggett v. White*, 128 Mass. 398; Gen. Stat., chap. 100, § 14. While it is not controverted by the defendants, that if a case were presented where the trustee was legally compelled to give bonds, it would be necessary to show, by

compliance with this requirement, that a transfer of the property was made by the executor, their principal contention is, that such is not the case at bar; and that if it can be shown that Healy had fully completed his duties as executor, it must be held that the residue of the property was lawfully retained by him as trustee. This question will be of less interest hereafter, as by the statute of 1873, chap. 122 (Pub. Stat., chap. 141, § 16), every trustee is required to give at least his own personal bond, which certainly contemplates that where the same person is executor and trustee, there shall be a distinct transfer of property to him in the latter capacity by authority of the Probate Court. *Parker v. Sears*, 117 Mass. 513. Even if this were a case where the trustee might be, and was by the will exempted from giving bond, we should not be prepared to say that the facts that Healy ceased at a certain time to do any acts as executor, — all that was necessary in that capacity being then completed, and thereafter did certain acts showing an intention to execute the trust, were alone sufficient, without any settlement of his account as executor in the Probate Court, to exonerate him and the sureties on his bond as executor. There should, in that case, be some public act, which could only take place in that court, indicating a discharge of himself in one capacity, and the acceptance of the trust imposed upon him in the other, before this transfer could take place. *Newcomb v. Williams*, *ubi supra*. This might perhaps be by any definite act assented to by that court, as where an executor, who had been appointed trustee, and had also qualified as such, charged himself in his account as executor with money paid to himself as trustee, which account had been allowed. *Crocker v. Dillon*, 133 Mass. 91.

In *Taylor v. Deblois*, 4 Mason, 131, cited by the defendants, an administratrix, after a decree of the Probate Court ascertaining the distributive shares of the intestate estate, took the guardianship of one of the persons entitled to a share, who was a minor; it was held that by operation of law she held the amount by way of retainer as guardian, and not as administratrix, and that no suit lay against her sureties upon the administration bond for the amount due her ward. But in that case, by a process in Rhode Island known as *quietus*, an administrator might be fully discharged by the Probate Court. This *quietus*, which was a decree rendered by that court, stated in substance, that the administratrix had fully administered the estate, and ordered that “she be, and hereby is.

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from henceforth acquitted and discharged of the same." Before this *quietus* she had signed a certificate to the Probate Court, which had been recognized by it, that she had in "her possession and control," as guardian, the shares of the minor whose property was afterward wasted.

State v. Hearst, 12 Mo. 365; s. c., 51 Am. Dec. 167; *Coleman v. Smith*, 14 S. C. 511, and *Carroll v. Bosley*, 6 Yerg. 220; s. c., 27 Am. Dec. 460, also relied on by the defendants, are all cases where the question of responsibility arose between the sureties on the bond of the principal defendant as administrator and the sureties on this bond as guardian. In these it was held, that when the time for the settlement of the estate as administrator had fully expired, and the distributive shares of the minors had been ascertained, it must be deemed that thereafter the funds were held by the principal defendant as guardian, as that was the capacity in which he had the right then to hold; and that the property was thus, by operation of law, vested in him as guardian. But we are referred to no case where the same person was administrator and guardian, and had failed to qualify in the latter capacity, in which it has been held that the sureties on his bond as administrator were discharged. The ground upon which the transfer of the property is presumed to take place, namely, that one should be deemed to hold in that capacity in which he ought to hold, has no existence where the principal has not qualified as guardian.

The will by which Healy was appointed a trustee for the distribution of the residue of the estate for "charitable purposes" did not exempt him from giving a bond; but the defendants contend that Healy was, from the character of the trust, so situated that he could not properly have been required to give bond; and that therefore, as it is shown by a variety of facts that after 1865 he held the property as trustee, he must be deemed to have discharged his sureties on his bond as executor. If it were true that he was entitled to enter upon his duties as trustee without giving bond for their faithful performance, there would be force in this position, especially if the debts and legacies having been paid, the residue had been ascertained by a proper decree of the Probate Court settling his account. But no such decree was ever made, nor was the trustee entitled to enter on his duties without giving bond.

The defendants upon this point rely on the case of *Lowell, Appellant*, 22 Pick. 215, which is followed in *Drury v. Natick*, 10 Allen,

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169. It is decided in *Lowell, Appellant*, that where property is given to trustees for the purpose of general charity, such as the gift there in question, which was for the promotion of education and the advancement of science by a permanent institution, and where the testator had provided for the perpetuation of the trusts, and for a continuous succession of trustees, without reference to the probate law, and where he also had appointed perpetual visitors of his charity, it was not a gift in trust for any person or persons within the true intent and meaning of the statute; and that in such case the trustee was not required by law to give bond before entering upon the duties of his trust.

The distinction between this case and that at bar is obvious. There is here no public charity, indefinite in duration, to be permanently established, where a perpetual succession of trustees is to take, hold and administer the property, provision being made for the rendering and auditing of its accounts, and for the supervision of a permanent board of visitors. The administration of a sum of money bestowed under such circumstances, and for such a purpose, may well be deemed to be beyond the control of the Probate Court. That which is here bequeathed is a sum of money to be distributed by a trustee for charitable purposes, which consists of the residue of an estate. No institution of public charity is to be founded, although the trustee may undoubtedly transfer the sum bequeathed to institutions formed for that purpose, and no fund is to be permanently held. Within such reasonable time as shall enable the trustee to make proper inquiry, in order to ascertain what individuals or societies coming within the terms of the trust may, in the just exercise of his discretion as trustee, be made the immediate recipients of the testator's bounty, the fund is to be distributed. The ground upon which it was held in *Lowell, Appellant, ubi supra*, that the provisions of the Rev. Stats., ch. 69, § 1, and in *Drury v. Natick, ubi supra*, that the provisions of the Gen. Stats., ch. 100, § 1, requiring a bond to be given in all cases by testamentary trustees, except where there was a special exemption by will, or where all persons interested consented that it should not be required, had no application to a public charity established in a perpetual succession of trustees, cannot be so extended as to exempt individuals charged with the distribution of sums of money "for charitable purposes" from giving bond to perform their trust.

It is suggested, that in the latter case, those who are to receive

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the benefit of this sum are entirely indefinite; that the only provision for putting in suit such a trustee's bond is "for the use and benefit of any person interested in the trust estate" (Gen. Stats., ch. 100, § 12; Pub. Stats., ch. 143, § 18); that no person or institution could thus describe itself; and therefore that it cannot have been intended that any such bond should have been given. We cannot assent to this. All persons who are themselves objects of charity within the legal meaning of the term, and any institutions founded for charitable purposes, might become interested. If the court should be compelled to select another trustee, in order to carry out the purpose of the testator, each of those who might become entitled by this selection, as made under the direction of the court, would be interested in the bond given by the original trustee, and might be empowered to bring suit thereon. Gen. Stats., ch. 100, § 12. After the decease of the original trustee, if any of the trust fund remained undisposed of, whether it were held that the power of selection was attached to the trust so that it could still be executed, or that it was personal so that the residue undisposed of would go to the next of kin, there would in either event be persons directly interested in the trust estate.

We are therefore of opinion that the sureties on the executor's bond of Healy are liable for the residue of the personal property received by him, and not disposed of for "charitable purposes."

In considering to what extent they are liable, it is necessary to determine whether they are responsible for the proceeds of the real estate sold by Healy. The will not only authorized, but directed, him to convert the whole real estate of the testator into money, as soon after the testator's decease as it should seem expedient, and provided that any deed executed by him should convey as perfect a title as if made by the testator. He was authorized to sell at public or private sale, and did so by authority of the will, and not of the Probate Court, within a reasonable time after the death of the testator, receiving therefor the sum of \$4,700. This sum was not needed for the payment of expenses, debts, or any specific legacies.

The condition of the bond, according to the statutes in force when it was executed, was in its second clause, which is the only one necessary to be considered, "to administer according to law and the will of the testator all his goods, chattels, rights, and credits, and the proceeds of all his real estate that may be sold for the payment of his debts and legacies, which shall come to the possession of said executor, or of any other person for him."

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By the statute of 1880, ch. 152 (Pub. Stats., ch. 129, § 5), the condition of a bond given under such circumstances was altered by striking out the words "for the payment of his debts and legacies," and inserting the words "or mortgaged." The same statute of 1880 provided that, where license or authority was given to an executor, etc., to sell real estate, no special bond to account for the proceeds need be given, unless the bond given on his appointment was insufficient. Of course the liability of the defendants is to be determined by the law as it existed when the bond into which they entered was made, and by its terms. The clause, "proceeds of his real estate that may be sold for the payment of his debts and legacies," cannot cover a responsibility for a sale which was not necessary for the payment of debts or any definite legacy. Such proceeds would form a part of the residuum of the estate; but as remarked by Chief Justice SHAW, "in common parlance, as well as in a more precise use of language, a 'legacy' is distinguishable from the gift of a residue, or share in a residue." *Quincy v. Rogers*, 9 Cush. 291, 297. Had the executor applied to the Probate Court for leave to sell real estate for the payment of legacies, assuming that there was no provision in the will in relation to the subject, it could not have been granted, if there was no existing unpaid legacy, but only a gift of the residuum. The only legacies for the payment of which the real estate could be sold by authority of the Probate Court were such as were definite, and that which was received from such a sale was the only money for which the sureties on the bond would be responsible. *Robinson v. Millard*, 133 Mass. 236.

It has been held in *Alley v. Lawrence*, 12 Gray, 373, that a devise to executors in trust for the support of the testator's children, with power to sell and convey any portion of the land, gives them a right to sell and convey in their own names without giving other bonds than as executors. It was not necessary there to consider what was the responsibility of the sureties for the money received from such a sale. Whether a power to sell given by will was to be treated as a personal trust and confidence only in executors named, so that it could only be executed by them, or whether, as prescribing the mode of administration of an estate, it would pass to survivors, or to an administrator with the will annexed, has also been a question several times discussed in our decisions. *Warden v. Richards*, 11 Gray, 277; *Greenough v. Welles*, 10 Cush. 571; *Chandler v. Rider*, 102 Mass. 268; *Tainter v. Clark*, 13 Met. 220. Even

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if an executor invested with a power to sell real estate, either as a matter of personal trust and confidence in him, or as a mode of administering the estate prescribed by the testator which might be exercised by any successor, might make a good title to real estate, it by no means follows that the sureties on his bond would be responsible for the proceeds of such real estate, in view of the limited character of that instrument. The power to sell real estate, independently of that which may be given by the Probate Court for the payment of debts and legacies, is a trust power differing from that which properly belongs to the executor or administrator. It may be that the probate of the will fully invests him with this power, and that even if he should properly give bond, he may convey a good title without doing so, and yet that the sureties on the original bond would not be responsible. All that the sureties have agreed to be responsible for, so far as the real estate is concerned, are "the proceeds of his real estate that may be sold for the payment of his debts and legacies." This is a definite obligation, and contemplates a sale of the real estate strictly for these purposes by authority of the Probate Court, as without this authority the executor or administrator as such can have no power to sell. To construe it as binding the sureties to be responsible for a sale of real estate made for no such purposes, but by authority of a trust power given in the will, is to extend their obligation much too far. There is certainly no expression in the bond which covers a responsibility for real estate sold under the authority of the will.

We understand that the argument by which this responsibility is deemed to exist is, that the real estate having been lawfully turned into money under the power of the will, the proceeds became of "the goods, chattels, rights and credits" of the estate, for the faithful administration of which the sureties were bound. If this argument were tenable, it would follow, that when real estate was ordered to be sold to a greater amount in value than was necessary for the payment of debts and legacies, which the Probate Court is authorized to do when land cannot be divided, the sureties on an administration bond in the form here used would be responsible for the surplus. Yet this is certainly not the case. An additional bond has always in such case been taken for the protection of this surplus, for the reason that the sureties in the original bond have been held not responsible for it, until the recent change in the administration bond. *Bennett v. Overing*, 16 Gray, 267; *Robinson v. Millard*, *ubi supra*.

There has been on this subject, it must be conceded, a conflict of authority in the decisions of the several States, not reconcilable by reason of the differences which exist in the form of the bonds considered in the several cases. They were all examined with great care in *Probate Court v. Hazard*, 13 R. I. 3. It was there held that in a suit on an administrator's bond conditioned to administer all the "goods, chattels, rights and credits" of the deceased, the sureties were not liable for proceeds of real estate sold by the executor under a power in the will. The words "the proceeds of real estate sold for the payment of debts and legacies" are not found in the Rhode Island bond, but how strictly these have been limited in Massachusetts is shown by the cases already cited. Even if the real estate has been changed into money by virtue of a power in the will, it is not, in our view, that personal property for the administration of which the sureties became responsible. The direction of the will that his real estate should be turned into money did not make it "his goods, chattels, rights and credits," for the administration of which, in addition to "the proceeds of all his real estate sold for the payment of debts and legacies," the sureties became responsible.

[Minor question omitted.]

In view of all the circumstances of the case, no willful breach of duty is shown; it may have been that Mr. Healy wrongly thought, indeed, that no legal duty was imposed on him, but an obligation binding on his own conscience only. There has certainly been a failure to pay over the money when it should have been done. Admitting that the trustee was entitled to a certain length of time for the selection of the proper objects of charity, no reason appears why an ample opportunity had not been afforded when he made, on February 25, 1867, the donation to the Ladies' Home Educational Society. The last act done by him strictly as executor was on November 25, 1865, and the whole estate had been converted into personal property a considerable time previously. Upon the balance then due, deducting the sum of \$4,700, the price of the real estate simple interest at six per cent should be computed from February 25, 1867, to the rendition of the judgment, and added to the principal sum. From this should be deducted Healy's commission of two and one-half per cent, as computed by the master, and the amount left in his hands.

Ordered accordingly.

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LARNED V. WHEELER.

(140 Mass. 380.)

Elections — action for erasing name of voter.

One whose name is wrongfully erased from the register of voters may maintain an action against the selectmen of the town therefor.

THE head-note shows the case. The plaintiff had judgment below.

J. Hopkins and J. M. Cochran, for defendants.

F. P. Goulding & A. J. Bartholomew, for plaintiff.

DEVENS, J. It is the contention of the defendants, that no action can be maintained against them for erasing the plaintiff's name from the register of voters, he having appeared before them at a meeting held for receiving evidence of the qualifications of voters, and furnished them with satisfactory evidence of such qualifications.

The law makes provision for a register of voters, and also for alphabetical lists. The latter are used at an election, and contain simply the names and residences of voters, while the former embraces a larger number of particulars. Pub. Stats., ch. 6, §§ 16, 18, 20. The provision that "selectmen of towns shall make and keep records of all persons entitled to vote therein at any election for town, county, State, or national officers, which shall be known as a register of voters," contemplates a permanent record, to be revised from time to time, as before any annual election, or upon affidavit that persons named are illegally registered. Pub. Stats., ch. 6, §§ 13, 15, 22. As it exists, it determines the right of persons to vote, as from it the alphabetical lists of voters are made. While the selectmen are to meet on the Saturday before the meeting for the choice of town, county, or State officers, to receive evidence of the qualifications of persons claiming a right to vote, and to correct the lists of voters, the first step in the latter duty is to correct the registration, which ceases at ten o'clock in the afternoon of that day. § 23. As no person can be added to the lists of voters until his name has been recorded in the register, according to the express words of the statute, so it would seem clear that it cannot be thence erased until it has been struck from the register. § 27.

The argument is not sound, that there must be a new register at each election, and that as it is so prepared for each, it cannot be said that any name is erased therefrom merely because it is not there found at ten o'clock on the Saturday afternoon previous to an election, when registration ceases, even if it had been on previous registers. While the register is subject to various modifications, such as those heretofore alluded to, it does not lose its substantial identity. The provision by which at any time, except that it must not be within seven days of an election, a legal voter may apply to the proper authorities, setting forth that a person named is illegally registered, sufficiently shows that the register is treated as always existing.

The rights of the voter in approaching the polls are indeed dependent upon the voting list, and the words "and no person shall vote at an election whose name has not been previously placed on such list," refer to the alphabetical list furnished to the officers conducting the election. Pub. Stats., ch. 7, § 9. But the voting list depends on the registration which has been theretofore made. When therefore the defendants struck the plaintiff's name from the register; they effectually deprived him of his right to vote at any subsequent election until it was restored thereto. It was the duty of those conducting the election to refuse his vote. The erasure of his name was the injury which he sustained, and if this was wrongful, he might maintain an action therefor, if at a meeting held for the purpose of registration he had appeared before the selectmen and furnished them with proper and sufficient evidence of his qualifications. *Lombard v. Oliver*, 3 Allen, 1, and 7 Allen, 155; *Harris v. Whitcomb*, 4 Gray, 483.

The fact that if he had formally tendered his vote, which had been refused, he might also have maintained an action for such refusal by reason of having furnished to the selectmen sufficient evidence of his qualifications as a voter before the close of registration, and requested that his name be put upon the list, should not deprive him of his remedy for the injury done him by the removal of his name from the register. Pub. Stats., ch. 7, § 10; *Blanchard v. Stearns*, 5 Metc. 298, 301. Whether he appeared before the selectmen before the close of registration for the purpose of having his name put on the register, or it being there, to prevent it being taken off, cannot be important. The removal of his name was, if wrongful, a direct injury, which deprived him of his right

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to vote. For this an action may be maintained, although there are also highly penal provisions in the statute, intended to provide for willful violations of the rights of a voter, under which the plaintiff does not seek to recover.

It was not material whether the plaintiff actually tendered his ballot, as it could not have been received, his name not being upon the list, nor whether the tax collector had or had not returned the plaintiff's name as having paid his tax, the injury done the plaintiff not being an omission or neglect of the defendants to register his name, but an erasure by them of the name. Pub. Stats., ch. 6, § 29.

The defendants urge that the declaration does not set forth a cause of action, because it does not show that the erasure was made from the register prepared for the election of November 6, 1883. The declaration was that an election was to be held on November 6, 1883; that the plaintiff's name had been and was on November 1, on the register of voters; that he had a right to vote at such election; that on November 3, although the defendants had sufficient evidence furnished them of his qualifications, they wrongfully removed his name from the list, by which he lost the privilege of voting. This sets forth a good cause of action, and although it also adds that the defendants wrongfully refused to receive his ballot, on which part of his declaration he was not entitled to rely, as the ballot had not been properly tendered, this could not affect the other cause of action, which was well set forth.

Exceptions overruled.

COMMONWEALTH V. LEONARD.

(140 Mass. 473.)

Criminal law — evidence of good character.

It is error to charge the jury in a criminal case that evidence of the defendant's good character can only be considered where the other evidence is doubtful, and that it is not of the slightest consequence when that evidence is strong, and the guilt of the defendant is impressed on the minds of the jury.

CONVICTION of receiving stolen goods. The defendant asked for an instruction that "Good character, like all other facts

in the case, should be considered by the jury, and if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is their duty to acquit." The judge refused, and instructed the jury as follows:

"When a man is put on trial charged with a criminal act, he has a right to put in evidence the reputation which he has from those who know him, his character in other words, by way of rebuttal of the inference that he might be likely to commit the act of which he is accused; if a person is charged with any act which implies dishonesty, he has a right to put in his reputation of being an honest man in order to furnish evidence that the character of the man accused is such that one would not be likely to expect crime to be committed by him. Character may properly be thrown into the scale to increase any reasonable doubt that the jury might have on the case in question; of course character is no excuse, a good name is no answer against decisive evidence; it is in a case where the evidence is doubtful, and the mind of the jury is in doubt, that the evidence of good character is thrown into the scale in behalf of the man; of course, if a man should come before a jury, a credible witness, and say he saw the accused party commit a crime, it would be no answer for that party to say 'my character has always been good.' It is important, where the evidence to convict is doubtful, that it should be thrown into the scale in his favor, but where the evidence is strong, and his guilt is impressed on the minds of the jury, of course it is not of the slightest consequence."

C. J. McIntire & G. A. Perkins, for defendant.

E. J. Sherman, attorney-general, and *H. N. Shepard*, assistant attorney-general, for Commonwealth.

FIELD, J. [Minor points omitted.] The third request was, we think, a correct statement of the law as it must now be held in this Commonwealth. The case was peculiarly one where evidence of the defendant's general reputation for honesty in his business deserved consideration. Such evidence is always competent in the trial of offenses of this character. It is not now the law, we think, that evidence of character can only be considered by the jury where the other evidence is doubtful, and

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that "it is not of the slightest consequence" where the other "evidence is strong," and the guilt of the defendant "is impressed on the minds of the jury."

In *Commonwealth v. Hardy*, 2 Mass. 303, 317, it was said that "in doubtful cases, a good general character, clearly established, ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses;" and in *Commonwealth v. Webster*, 5 Cush. 295; s. c., 52 Am. Dec. 711, a distinction was taken between crimes "of great and atrocious criminality" and "smaller offenses," and it was said that "against facts strongly proved good character cannot avail," and that in the smaller offenses, such as "pilfering and stealing, where the evidence is doubtful, * * * proof of character may be given with good effect." Both these decisions were before the Gen. Stats., ch. 115, § 5 (Pub. Stats., ch. 153, § 5), which provided that "the courts shall not charge juries with respect to matters of fact, but may state the testimony and the law."

The distinction taken in *Commonwealth v. Webster*, if it be regarded as matter of law, has been expressly disapproved of in *Cancemi v. People*, 16 N. Y. 501; *Harrington v. State*, 19 Ohio St. 264; and *People v. Garbutt*, 17 Mich. 9.

The old rule, that evidence of the good character of the defendant is not to be considered by the jury unless the other evidence leaves their minds in doubt, has been much criticised, and the weight of authority is now against it. 1 Bish. Crim. Proc. (3d ed.), §§ 1115, 1116; 3 Russ. Crimes (5th ed.), 391; 3 Greenl. Ev., § 25; Whart. Crim. Ev. (9th ed.) § 66; *Stewart v. State*, 22 Ohio St. 477; *People v. Ashe*, 44 Cal. 288; *State v. Henry*, 5 Jones (N. C.) 65; *Remsen v. People*, 43 N. Y. 6; *State v. Lindley*, 51 Iowa, 343; *Heine v. Commonwealth*, 91 Penn. St. 145; *State v. Daley*, 53 Vt. 442; *Coleman v. State*, 59 Miss. 484; *Cancemi v. People*, *ubi supra*; *Harrington v. State*, *ubi supra*; *People v. Garbutt*, *ubi supra*.

If evidence of reputation is admissible at all, its weight should be left to be determined by the jury in connection with all the other evidence in the case. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt in the minds of the jury, although without it the other evidence would be convincing. To instruct a jury, that they are first to consider the other evidence in the case, and that if they are thereby convinced beyond a

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reasonable doubt of the guilt of the defendant, they are to disregard the evidence of good character, and that they are only to consider this evidence when their minds are left in doubt by the other evidence, and when perhaps the defendant does not need the evidence of character for his acquittal, is a practice that finds even less support in reason than in authority.

The old practice of charging juries, that evidence of character was of little or no weight, except in doubtful cases, undoubtedly grew up when judges were accustomed to express their opinions to jurors upon matters of fact, and the weight to be given to evidence, and was perhaps sufficiently just in particular cases; but we think it ought not to have been made a rule of universal application, that is, a rule of law; and since the passage of the Gen. Stats., ch. 115, § 5, it is open to the objection that it is charging juries upon the weight to be given to evidence, when the law, in our opinion, does not define the degree of weight to be attached to it.

Exceptions sustained.

ROBBINS V. ROBBINS.

(140 Mass. 528.)

Marriage — divorce — adultery — connivance.

A husband suspecting his wife of adultery with a lodger in his house, informed his wife that he was going out of town and should not return that night or until late that night. He did not go out of town, but watched the house in the evening until he saw the lights in his wife's and the lodger's room extinguished, and then secretly entered and surprised them in bed together. This particular act of adultery would not have occurred but for the husband's scheme. *Held*, not a "connivance" by the husband. (*See note, p. 492.*)

ACTION of divorce. The trial court reported the case for the consideration of the full court, as follows:

"On the day before the adultery was committed, the libellant, having begun to suspect his wife in connection with a man then lodging in his house, requested his son in Boston to telegraph for him to come to Boston the next day, if he did not come to town in the morning. The next day the telegram arrived; the libellant informed the libellee of its arrival, that he must go to Boston and

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that he should probably not return that night, and that if he did, he should not return till late; but in pursuance of an interview with counsel, he secretly made arrangements to be driven to his house about half-past eight o'clock that evening. By reason of the libellant's necessary visits to Boston, and otherwise, frequent opportunities for adultery existed, but this particular one would not have existed except for the scheme as stated herein. The usual hour of going to bed was about nine. Between half-past eight and nine, the libellant drove with a witness to his house, as he had arranged. He arrived before the lights down stairs were put out, and stopped for a moment, and then drove round a square, taking about five or six minutes, and then came back. At about nine the lights down stairs were put out; shortly after, that in libellee's room was extinguished; and from what was seen in the lodger's room, the libellant was led to suppose that the libellee had entered it. He then at once entered the house, secretly, with the witness, went up stairs, and found the libellee and the above-mentioned lodger in bed.

“The foregoing conduct of the libellant constituted a scheme to detect the libellee if she was guilty, but there was no corrupt intent that adultery should be committed, or any assent to or connivance at it, unless the foregoing conduct amounted to connivance, as matter of law, which I ruled it did not, and ordered a decree of divorce to be entered.”

C. Cowley, for libellee.

J. N. Marshall, for libellant.

FIELD, J. The justice who heard the case found as a fact that the conduct of the libellant, described in the report, constituted a scheme to detect the libellee, if she was guilty, but that there was no corrupt intent that adultery should be committed, or any assent to or connivance at it, unless the conduct of the libellant amounted to connivance as matter of law, which he ruled it did not. It is not found by whom the man who lodged in the house was invited to lodge there, or that he was of bad reputation, or was introduced by the husband to the wife, or that lodging there under the circumstances made him a member of the family, or what the conduct of the wife with him was which excited the suspicions of the husband,

and it is impossible to hold that on the facts found, it was so far the duty of the husband to expel the lodger, that by not doing this, he must be held, as matter of law, to have connived at the adultery.

This court has assumed that the legislature, in conferring upon it jurisdiction to grant divorces from the bond of matrimony, although the statutes make no provision respecting connivance, collusion, condonation, or recrimination, intended to adopt the general principles which had governed the ecclesiastical courts of England in granting divorces from bed and board, so far as these principles are applicable, and are found to be reasonable. Although the procedure may be "according to the course of proceeding in ecclesiastical courts" (Pub. Stats., ch. 146, § 33) yet it is not clear that the decisions of those courts upon questions of substantive law are of the same weight here as are the decisions of the English courts of law and chancery. One reason is that the ecclesiastical courts proceeded according to the canon law, as allowed and adopted in England, but the canon law was never adopted by the colonists of Massachusetts; it was not suited to their opinions or condition. Marriage and divorce here have always been regulated wholly by statute. *Commonwealth v. Munson*, 127 Mass. 459; *Sparhawk v. Sparhawk*, 116 Mass. 315.

By the Stat. of 20 & 21 Vict., ch. 85, a court for divorce and matrimonial causes was established in England, and jurisdiction given it to decree a dissolution of marriage; and it was expressly provided that if the court should find that the petitioner had, during the marriage, been accessory to, or conniving at, the adultery, or had condoned the adultery complained of, or that the petition was presented or prosecuted in collusion with either of the respondents, the petition should be dismissed. § 30. By section 31, it was also provided that if the court found that the case of the petitioner was proved, and did not find either connivance, collusion, or condonation, the court should not be bound to pronounce a decree, if it should find certain other facts concerning the libellant, of which one was "such willful neglect or misconduct as has conduced to the adultery." It is obvious that decisions under this statute may turn upon its provisions, and not upon general principles applicable to the law of divorce. It was partially at least upon the construction of this statute that *Gipps v. Gipps*, 11 H. L. Cas. 1, was decided.

It is not easy to reconcile all the decisions of the ecclesiastical

courts upon connivance; the law and facts are not always separated; and those courts have considered questions of morals somewhat more freely than we under our statutes feel at liberty to do. Many of the cases are collected in *Phillips v. Phillips*, 1 Rob. Eccl. 144; 3 Notes of Cases, 444; 4 Notes of Cases, 523; 5 Notes of Cases, 435; and it is there held that a corrupt intention is necessary to constitute connivance. The reasonable foundation of the rule, that connivance prevents the libellant from maintaining his libel for adultery, is that he has consented to the adultery, although it may be by a consent unexpressed and unknown to the libelee. This consent must necessarily often be inferred from circumstances, but the fact must be found that the libellant either desired and intended, or at least was willing, that the libelee should commit adultery, before the libellant can be said to have connived at it. There is a manifest distinction between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunity.

It was argued that it was the duty of the husband to protect his wife, and to control her conduct if it excited suspicions; and undoubtedly husband and wife ought mutually to aid each other in doing right, and to guard each other from doing wrong. But, the legal duty of the husband to control the conduct of his wife cannot be greater than his legal right; and by modern law and usage, the right of a husband to control the conduct of his wife has largely, if not wholly, disappeared. A husband cannot imprison his wife in order to protect her against seduction, nor is he compelled always to attend her, or to remain at home with her. A chaste husband ought, if he desires it, to have a wife who will remain chaste when exposed to the temptations which are incident to the ordinary conditions of modern social life; and if she commits adultery against his wishes, and without his procurement, he ought to be permitted to obtain evidence of it.

Morrison v. Morrison, 136 Mass. 310, was decided upon the ground that the justice who heard the cause found, as a fact, that the husband, from the time that his suspicions were first excited, was in his mind willing that his wife should commit adultery, provided that he could thereby obtain a divorce, and that this finding,

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together with the evidence of his conduct toward his wife and suspected paramour, was sufficient to warrant the finding of connivance. The only cases there cited are those which hold that a corrupt intent is necessary to constitute connivance.

Decree affirmed.

NOTE BY THE REPORTER. — For criticism of this decision, see 33 Alb. Law Jour 401.

Bishop says (Marr and Div., § 9). "A husband who suspects his wife of adultery may take means to procure proof. But he must not lead her into a fresh wrong because he fears she is guilty of an old one. He may watch her: even leave open the opportunities which he finds; *but he must not make new ones, or lay temptations in her way.*" And § 20. "If the husband receives a caution concerning the conduct of his wife, or if he see what a reasonable man could not see without alarm, * * * he is called on to exercise a peculiar vigilance and care over her; and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he will be presumed to see and mean the consequences."

Timmings v Timmings, 3 Hagg. Ec. 137, cited in *Phillips v Phillips*, 3 Notes Cases, 481, Lord STOWELL said: "He is perfectly at liberty to let the licentiousness of the wife take its full scope: but that he is to contrive the meeting — that he is to invite the adulterer, then to decamp, and give him the opportunity, I do think amounts to legal prostitution." In this case, the husband, suspecting his wife of adultery with Smith, allows him to sup with them, and "then goes out and leaves them together for sometime, during which they commit adultery." This was held connivance.

So in *Morrison v. Morrison*, 3 Hagg. Ec. 105, Lord STOWELL said: "It must be seen 'that he has practiced a train of conduct which led to her guilt, and which he foresaw and intended should lead to it.' Mere passive connivance is as much a bar as active conspiracy."

In *Bunnell v. Greathead*, 49 Barb. 106, an action of crim. con., where the plaintiff did not interpose to prevent, but followed his wife, and secretly watched the illicit intercourse, it was held that he could recover only actual damages

Schouler says (Husb. and Wife, § 540) "This corrupt consent will be presumed from passive as well as active encouragement of the offense, and conduct amounting in substance to an estoppel."

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(140 Mass. 533.)

Stocks—rights of life-tenant and remainderman.

Where a will provides for a trust to pay income to one for life with remainder to another, and the trustee invests in bonds at a premium, payable at a certain day, he may deduct from the interest received on each bond enough to make good, by successive deductions, the amount of such premium, without regard to the market value of the bonds at the time of deduction.*

ACCOUNTING of a trustee. The head-note states the point.

J. L. Stackpole, for appellant.

J. H. Benton, Jr., for appellee.

DEVENS, J. [Omitting other considerations.] This is an appeal from a decree of a single justice of this court, affirming a decree of the Probate Court, by which the account of the New England Trust Company, a trustee holding a fund, the income of which is payable for life, with remainder over, was disallowed. The system pursued by the trustee with reference to the investments which it had made in bonds, and other promises to pay, of the United States government, or of municipal or railroad corporations, due on a day certain, and which had been bought at a premium, has been to ascertain, by tables in use among bankers and brokers, what is in fact the net income arising from these promises, considering the premium actually paid by the investing trustee, which would not be repaid at the maturity of the bond, the rate of interest, and the date of payment of the security, and to pay over this net income to the life-tenant, the difference between this net income and the actual rate of interest as received going to a fund, which at the date of the maturity of the promise would leave the original capital intact. The decree appealed from directed the trustee to pay to the life-tenant, as income, the sums thus reserved for the purpose of being returned to the capital.

It is the general rule, that where investments are made in property of a permanent character, and not in terminable securities, the loss or gain in such investments is that of the corpus of the estate.

* See ante, 264.

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If for any cause an investment be reduced in value, and it becomes necessary to sell it, the sum for which it is sold becomes a new principal, on which the life-tenant is to receive the income. In the management of real estate, when permanent improvements are placed thereon, they are a proper charge on the capital, while usual and ordinary repairs are a deduction from the income. *Parsons v. Winslow*, 16 Mass. 361.

If a trustee purchases shares in the capital stock of a bank, inasmuch as the remainderman will receive exactly that which is purchased, the tenant for life should receive the full income thereof undiminished. Such was the course pursued by the trustee in the case at bar, in regard to the bank shares purchased by it. Nor does it become the duty of the trustee to sell such shares, should they appreciate in value after he has invested in them, and to pay over to the tenant for life the amount which they have increased in value. If it becomes necessary, in the proper administration of the trust estate, to sell such shares, the gain or loss is that of the capital of the estate, and the sum received constitutes a new principal.

The tenant for life does not seek any order by which the bonds, the interest on which is here under discussion, are to be sold, or the investments changed. Nor can it be contended that these securities are not of a class in which trustees may invest, if due care has been used in the selection. The rule, says C. J. SHAW, "that no investment can be considered safe, or can be approved by a Probate Court or court of equity, except in public securities, however well supported by authorities, as a rule well established in English courts of equity, is wholly inapplicable to this country, and untenable." *Lovell v. Minot*, 20 Pick. 116, 119; s. c., 32 Am. Dec. 206. While there are now many more public securities than those which existed when these remarks were made, investments cannot be confined to them. A loan at a fixed rate of interest, even if secured by the stock of a manufacturing or other business corporation, as collateral security, if proper precaution is taken against fluctuation, is not necessarily injudicious. *Brown v. French*, 125 Mass. 410; s. c., 28 Am. Rep. 254. There are many stocks under public supervision, such as bonds of corporations where there is sufficient capital to insure their safety, which with bonds of municipalities, loans secured by mortgage, etc., constitute proper investments.

The purchase of the bonds by the trustee in the case at bar appears to have been judiciously made; substantially all have appre-

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ciated in value; and they are of the class of securities contemplated as investments by the statutes under which the trustee does its business. Stats. 1869, ch. 182, § 5; 1871, ch. 142; Pub. Stats., ch. 116, § 20.

Assuming that the purchase of bonds at a premium was safe and prudent, and such as judicious men would make in the conduct of their affairs, which is substantially the rule heretofore laid down, the question arises inasmuch as it is certain that the corpus of the fund is to be diminished if this investment is permanent, whether the trustee may retain such sums annually as will restore to the fund, at its maturity, exactly what was taken therefrom at the time of the purchase. This is what the trustee has undertaken to do. If as suggested in argument, there is any inaccuracy in the calculation by which this result is reached, this is a subordinate matter, to be determined by more accurate accounting, should it be required, not necessary now to be discussed. That which is really income from a bond purchased at a price above par, say \$120, and payable in ten years, is not the amount received in interest annually, but that amount, deducting therefrom the sum necessary to restore, at the end of the ten years, the \$20 premium. No prudent man would treat as income from his property the whole amount received, when there was thus to be a diminution of his principal amounting at the end of the ten years to this premium, and steadily tending to this during the entire period. To deal with interest thus received as income purely would to the extent of the premium, exhaust the capital. The premium paid is no more than an advance from capital, which the remainderman is entitled to have repaid, if he is entitled to receive the capital intact. If in such a cause the tenant for life should die before the maturity of the bond, and thus the whole advance not then be repaid, he would have paid no more than his just proportion. Unless the premium is to be restored, it is not easy to see how investments in bonds bearing a premium can, in justice to the remainderman, be made his property where a bond is kept to maturity being diminished solely for the benefit of the tenant for life. Into the question how much income an investment at a premium in a bond payable at a fixed future time produces, the loss of the premium at that time necessarily enters as a factor.

The bonds purchased by the trustee have substantially all appreciated in value, and this to such an extent, that if they were now sold, the surplus above the sum which would be necessary to

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restore to the capital all that was paid at the time of purchase by way of premium would enable the trustee to pay the tenant for life the deductions that have heretofore been made in order to repair the principal at the maturity of the bond. The life-tenant therefore insists that the trustee should now be ordered to pay to her these sums, since, if a sale were made at this moment, they would not be needed to repair any deficiency in the principal. The trustee is to manage the fund in his hands, not for the purposes of speculation, but in regard to the permanent disposition of the fund. *Harvard College v. Amory*, and *Lovell v. Minot*, *ubi supra*.

The argument of the tenant for life, that the practice of holding securities until their maturity would deprive him of the very care and ability in the management of the trust for which he pays compensation to the trustee, can readily be pressed so far as to sanction a practice of trading and trafficking in trust securities, which would be attended with dangerous results to the trust fund. Investments carefully and judiciously made are not, as a general rule, to be disturbed. The argument of the tenant for life asserts that the income obtained for her is less than one-half of that which might be obtained on absolutely safe mortgages. The case affords no evidence of this, nor in this proceeding, which only concerns the account of the trustee and the amount of its payments to the tenant for life, could it be settled whether, in this view, the trustee should be ordered to dispose of these securities.

But if the securities were sold, and a larger sum realized than would be necessary to restore to the corpus of the estate that which was taken from it when they were purchased, the question would still be, whether the appreciation of the securities in market value was the property of the tenant for life, or of the remainderman. There is no ground on which it can be contended that it belongs to the tenant for life, unless she is also to be made responsible when loss occurs in the purchase and subsequent sale of securities.

There cannot be this chance of profit for her, unless there is to be a corresponding risk in such transactions. If the rule be just, that when a security is kept to maturity, income is to be paid only to such an extent as shall leave the corpus of the estate at that time intact, by restoring to it the premium paid at the time of purchase, it is equally just that the gain or loss that occurs by a sale thereof, if for any cause one shall become necessary while it is

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running, should be that of the corpus of the fund. The estate of the tenant for life will be unaffected thereby, except so far as it may be altered when a change is made in securities by the increase or diminution of the sum to be reinvested. To expose the estate of the tenant for life to any risk beyond what is involved in this—and because there may be a possible chance for gain, under some circumstances, by changes in investments, to subject it to the loss which occurs, when for any cause it becomes necessary to sell at a diminished price securities purchased for the trust estate—would be to defeat the object for which tenancies for life are in most cases created.

In *Parsons v. Winslow*, *ubi supra*, there had been a loss to the trust estate by the defalcation of the trustee, whose successor had been able to recover from him, in value, only a portion of the property originally intrusted to him. It was held that the recovered fund, thus diminished, would constitute a new principal, and that the loss would thus “be apportioned in the same manner, as if it had arisen from the fall in the price or value of any public stocks, or of any land, in which the fund should have been invested according to the provisions of the will.” It is said by Mr. Justice JACKSON: “It would be unjust, and contrary to the manifest intent of the testator, if the tenant for life, on the one hand, should continue to receive the whole amount of the interest on the original fund, after the principal had been thus reduced; or if on the other hand, the income should be applied to replace the principal. In the one case, the tenant for life would be left, for an indefinite period, without any support or benefit from the intended bounty of the testator; and in the other, the reversioner might lose the whole that was intended for him.”

It has been suggested, that a suspense account might be kept by the trustee, to which sums such as have in the case at bar been retained might be carried, and that if hereafter the bonds should be sold before maturity at an advance, the life-tenant should be entitled to receive therefrom all that is not required to restore the capital originally invested. This suggestion is based upon the theory, that any possible profit made by the sale of securities belongs to the tenant for life, and still involves the idea that she must bear the possible loss. We cannot concede this, except so far as her estate is affected by the increase or diminution of the sum to be reinvested. Such a suggestion would require, as a corresponding

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duty, that when a bond was depreciating in value such sums should be retained from the life-tenant's income as would be necessary to repair the loss to the capital of the estate by such depreciation, should it be sold before maturity.

There can ordinarily be no better test of the true income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman, than the interest which can be received from a bond which sells above par and is payable at the termination of a fixed time, deducting from such interest, as it becomes due, such sums as will at maturity efface the premium. If such a bond has increased in value since its purchase, assuming it to have been an entirely safe investment, and none other should be made, it is because a change in the rates of interest, or some similar cause, has altered market values. There would be no reason to suppose that such a bond could be sold, and the amount received reinvested at a higher rate of interest, unless at the sacrifice of some safeguard in the investment. Investments of trust property should be made with a view to safety, and changes should not be made except after much inquiry and circumspection, and ordinarily with an immediate and advantageous reinvestment in contemplation. In making such changes, a trustee is not entitled so to exercise his authority as to vary or affect the relative rights of the *cassus que trust*. Hill on Trustees (4th Am. ed.), 758.

The only case in this country which we have found, or to which we have been referred, deciding the question we have considered, is *Farwell v. Theddle*, 10 Abb. N. O. 94, in which it was held that a course similar to that pursued by the trustee in this case was correct and proper.

Not much assistance is to be expected from the English cases, as until the Stat. of 22 and 23 Vict., ch. 35, § 32, authorizing investments in East India stock and bank stock, only one security, the three per cent consols, was there recognized as proper for trust estates. An investment in the three per cents, which it is not contemplated will ever be paid, and the holders of which have been considered as perpetual annuitants, has been deemed the only safe investment, and peculiarly adapted for the purpose, as until a recent period they have been below par. The principle is well established by all the English cases, that the corpus of the trust capital is to be kept intact, so that the remainderman may thus receive it, while in justice to the life-tenant it must be kept in income-pro-

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ducing property. Where the testator makes a general gift of his estate to, or in trust for, a person for life, with remainder over, so much of the property as consists of leaseholds, terminable annuities, or other interests of a perishable nature, must be converted, and reinvested in these permanent securities. As they are permanent, whether purchased below or above par, the life-tenant receives the full income, the remainderman receives undiminished that which has been purchased, and no adjustment of the relative rights of the respective *cestuis que trust* has been necessary.

There may be specific gifts of terminable or perishable securities of such a character as to show an intention on the part of the testator that the life tenant may exhaust or consume them. In the absence of such intention, if in contravention of the general rule the trustees suffer the tenant for life to receive the whole income arising from such securities, he will be decreed to refund what he may have received over and above what he would have received if the conversion had been duly made and the proceeds invested in the three per cents. This difference is treated as capital to be invested for the benefit of all parties entitled, and the tenant for life is bound to make it good in the first instance. On his failure to do so, the trustees are responsible therefor. Hill on Trustees (4th Am. ed.), 591, and cases cited; Perry on Trusts, § 547.

The same principles have been applied since investments of trust funds were, by the Stat. of 22 and 23 Vict., ch. 35, permitted to be made in East India stock, which is a security that may be redeemed, as well as in certain other stocks named. The courts have constantly refused to allow any investments to be made therein, unless there were peculiar reasons for favoring the life-tenant, or at the request and on the application of the settler of the trust. *Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379. In such case the direction has sometimes been, that the investment should not be made unless the stock could be purchased at par. *Waite v. Littlewood*, 41 L. J. Ch. 636. One reason, given in *Cockburn v. Peel*, 3 De G., F. & J. 170, for refusing to permit a purchase of East India stock, was that it must be purchased at an advance, and that there was no provision in the act for any sinking fund by which the deficiency made in the capital could be supplied.

In *Hume v. Richardson*, 4 DeG., F. & J. 29, it was held that for the period between the death of the testator and the passing of

the Stat. of 22 & 23 Vict., ch. 35, the life-tenant was entitled only to such income as she would have received had the stock been converted and invested in consols, and that although after the passage of this statute she was entitled to the whole income, yet the trustees were only justifiable in keeping the East India stock until a suitable investment could be made in lands, in which by the will the trustees were directed to invest.

Brown v. Gellatly, L. R., 2 Ch. 751, decides no more on this subject than that, when a testator authorizes investments as permanent which would otherwise be unauthorized, the life-tenant has the full income: The authority given by the will indicated a preference of the life-tenant to this extent, which took the case out of the ordinary rule. "I understand" says Lord CAIRNS, "the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than this court itself would have approved of, and the court has merely to follow his directions, and treat the income accordingly, as being the income of authorized securities." Other securities not coming within this class were ordered to be converted as soon as possible, and until this could be done, it was decreed that the life-tenant would be entitled thereon "to the dividends upon so much three per cent stock as would have been produced by the conversion and investment of the property at the end of the year,"—that is, a year after the testator's death.

The method in which the English courts deal with leasehold estates, a common species of terminable securities not known in the same form in the United States, where they are settled in trust for life, with remainders over, under such circumstances that the settler must have regarded them as continuing interests for all the beneficiaries of the trust, including the remainderman, is strictly analogous to that which the trustee in the case at bar has pursued. These estates, which are terminable on a life or lives, or at the end of fixed terms, are renewable sometimes by express contract and sometimes by custom which has been recognized as legal, upon the payment of certain fines and other expenses. It is held to be the duty of the trustees to preserve the leasehold estates by renewing at the usual periods, for the benefit of the parties in remainder. In the absence of other direction by the settler, the fine, etc., for the renewal is to be paid out of the rents and profits, in the proportion in which the *cestuis que trust* enjoy the estate. If a renewal becomes impractical, the tenant for life does not reap the whole ad-

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vantage of non-payment of the sum properly due for the renewal, if there is an express trust for renewal. His interest, less the expenses of the renewal, is all that is given him, and his proportion of the amount fairly to be paid for renewal is still a proper charge on the leasehold estate, for the benefit of the remainderman. Where the leasehold estate is for years, the amount to be paid is readily ascertainable by the proportion which the tenant for life enjoys of the leasehold estate. Where it is for lives, and there is no express fund created for the renewal, it is more difficult, and the court has sanctioned the plan of insuring the lives of the *cestuis que vie* to an amount sufficient to cover the usual expense of renewing on the dropping of a life. Hill on Trustees (4th Am. ed.), 683.

While the cases on this subject are complicated by the express provisions made in the settlements, and appear in some respects confused, they establish fully the position, that in the absence of direction otherwise, the property received is to be turned over by the tenant for life as he received it, and that his income is not the full rents and profits, but these, after deducting therefrom, as accurately as it can be ascertained, his just proportion of the expense of maintaining the security by renewal of the lease.

The tenants for life rely much upon *Hemenway v. Hemenway*, 134 Mass. 446. This was a bill in equity which brought before us the whole management of a large estate, in which very ample discretionary powers had been given to the trustees. The testator had left, subject to the trust, bonds payable at a fixed period. As between the tenants for life and the remaindermen, it was decreed that the trustees, by the authority conferred by the clause of the will "to hold the said property as they may receive the same, or at their discretion to sell the same," were entitled to continue these investments as such, and to retain these bonds until they were paid off, and that "the whole net income of investments thus authorized must go to the tenants for life by the terms of the will."

There was also an investment made by the trustees in certain bonds having nearly eighteen years to run, on which a small premium had been paid. The case was decided upon its own peculiar circumstances, which so far as disclosed were held to show no special reason why the tenants for life should not receive the interest paid on the bond. The investment constituted "a very small proportion of a large estate," and Mr. Justice HOLMES remarks: "We have no reason to doubt, that taking the whole

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administration of the trust into account, the balance has been evenly held between the two parties, and the relation between the remaindermen and the life-tenants is such that there is less call than there might be in some other cases for treating the life-tenants with great strictness." It certainly was not held that the trustees might not, under some circumstances, purchase for the trust estate at a premium bonds payable at a fixed time, and exercising their discretion honestly and for the purpose of dealing fairly with both parties, might not reserve some portion of that paid as interest, sufficient at the end of the period to restore the premium to the capital, by the loss of which it would otherwise be depleted.

Upon the account rendered by the trustee in the case at bar, as heretofore said, the question whether by virtue of our supervision over trusts, the trustee should be ordered to change its investments, is not brought before us. Upon these as they exist, the deduction from the full interest reserved to restore the premium at the end of the term was properly made. It is only thus that the property can be turned over to the remainderman undiminished. If the estate of the tenant for life terminates before the bond is payable, the cost of effacing the premium will be borne in the right proportion by the respective *cestuis que trust*.

In the opinion of a majority of the court, the entry in the case should be

Decree reversed.

HOLMES, J. (dissenting). If the opinion of the majority of the court went on the ground that so far as appears, the trustee might have made these investments with the intent to keep them until the trust expired or the bonds matured, and in the exercise of its discretion as a business manager, in view of the particular circumstances of the case, thought it necessary to retain a fund in suspense against a probable loss of premium, speaking for myself alone, I should have been disposed to acquiesce in that opinion. But from the main line of reasoning actually adopted, I am constrained to dissent upon grounds both of principle and authority.

Shortly stated, I understand that reasoning to be this: That if a bond is bought at a premium, it must be assumed that the premium is paid for the single reason that the rate of interest on the bond is higher than the market rate, because it must be assumed that the investment is absolutely safe; that therefore the analogy

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of wasting investments, such as leaseholds, applies, and that an annual deduction from interest is proper.

So far this is precisely the argument which was pressed upon us with much force in *Hemenway v. Hemenway*, 134 Mass. 446, and which was rejected after the gravest deliberation. A great part of the opinion was devoted to answering it, and it still seems to me that the discussion was necessary to the decision of the case.

Hemenway v. Hemenway, as I conceive, did not bring before us the whole administration of the estate, but certain specific questions, one of which was, whether the interest should make good the premium paid by trustees for bonds purchased by them above par. If the rule now adopted had been recognized, it would have been unnecessary and improper to look beyond the particular bonds to the rest of the account. It was because that rule was repudiated, that it was said, and deliberately said, that nothing showed that the premium was paid for interest above the market rate, and that the whole administration of the trust might be considered. The latter principle is not the law in jurisdictions where authorized investments are limited in number, as in New York, but each investment is dealt with separately. The only reason for departing from the precedents elsewhere was, that in the latitude allowed trustees in this Commonwealth, it was thought impossible to assume that premiums were paid in respect of interest alone.

I think, therefore, that the reasoning of the majority is opposed to one of the points directly decided in *Hemenway v. Hemenway*, as it certainly is to the main line of discussion in that case, and I am confirmed in my opinion by the fact, that two others of the four surviving justices who took part in the decision are of the same mind. I must suppose that *Hemenway v. Hemenway*, has been accepted by trustees as expressing the settled opinion of the court. I cannot foresee the extent or nature of the evil that may follow from our abandoning what has been acted on as law. But I should be most unwilling to overrule a decision which I supposed to have been accepted as a guide in dealing with property, even if I thought it wrong. I do not however think either the decision or the reasoning in *Hemenway v. Hemenway* wrong, and I refer to that case for what I do not deem it necessary to repeat here.

But I understand the opinion of the majority not to stop with overruling *Hemenway v. Hemenway*. In this case, the bonds thus far have not depreciated, but have risen in value. No part of the

premium has been lost as yet. But the argument is either that it is to be presumed that bonds will be kept until the premium is lost, or else that the approach to maturity is a constantly acting cause which depreciates the bond so much each year with mathematical certainty, and that even if the depreciation is disguised by a more powerful motion the other way, it must be allowed for, because the rise in value belongs wholly to the corpus, and would have been so much greater but for this counteracting influence.

I think I fully appreciate the logical force of this argument, but it appears to me to illustrate the danger of relying on logic when the premises are fictitious. The necessary premises for casting the whole burden of repaying premiums upon interest is that the premium is paid solely for interest above the market rate. If that premise is a fiction, as I think it is, and if considerations of policy are held nevertheless to justify its adoption, at least the conclusions to be drawn from it should be guarded and restrained by considerations of a similar nature. I can hardly think, that if the trust had been terminated or the bonds sold at the date of the account, when the corpus had actually gained by the investment, the sums retained from interest would be paid over to the remainderman. Yet that conclusion seems to me to follow from the reasoning.

I think, in other words, that the question of holding the balance even between tenant for life and remainderman is a problem so dependent on the particular facts, and so complex, that while we cannot hope to solve it with perfect accuracy, every one would feel that to cut the knot with a formula in the case I have supposed would be an unnecessary abandonment of the discriminations within our power, and as a practical judgment, would be as likely to work as justice.

If I am right so far, what difference can it make that the trustee has not sold? Whether it is or is not true, as is said in *Hemenway v. Hemenway*, that a determination not to sell, if a sale is possible, stands on much the same footing as a purchase, I apprehend that, if a trustee having the usual powers sells and reinvests twenty times in as many days, he is not *ipso facto* guilty of a breach of trust, and that if the reinvestments are proper and profitable, his conduct would not be open to animadversion. On this point the English books can give us no light. At all events, this trustee might sell now if he saw fit. On what ground is the determination of the

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trustee not to sell — a determination which in this case the court cannot revise — to change the relative rights of *cestuis que trust*?

Let us look a little further into the rule adopted. Suppose a sale to have taken place, and other bonds to have been bought at a price above par. The trustee will, of course, compute the rate of interest to be received by the tenant for life in the future by deducting the annual sums necessary to replace the new premiums paid. But there is no particular sanctity in the rate which happened to prevail at the moment of purchase, still less in the rate artificially determined by the premium paid. If there has been no sale, but the market price of the bonds has risen, *ex hypothesi* the rate of interest is conclusively proved to have fallen, because a fall in the current rate of interest is the only recognized ground for a rise in price. Why is not the remainderman entitled to have a new computation started on that footing? Why is not the tenant for life entitled to have the reservation diminished if the rate of interest rises? And pushing the principle to its logical result, why is not the trustee bound to follow the fluctuations of the market from day to day, attributing them all to the fluctuations of interest, as he is bound to do.

I now recur to the premises of the argument which I am opposing. I repeat what was said in *Hemenway v. Hemenway*, that I do not see how we can start with the assumption that all proper investments are absolutely safe, when the leading case in this State is to the very point that an investment may be unsafe, and yet justifiable. *Lovell v. Minot*, 20 Pick. 116; s. c., 32 Am. Dec. 206. But the assumption appears to me to be inconsistent with facts which we must notice, and to lead to conclusions not yet mentioned, which we could not accept. Within a few years the first mortgage four per cent bonds of a flourishing railroad have sold at eighty-five, while at the same time United States four per cents stood at one hundred and twenty or more, and city fours of a high rank stood at about par. The differences were not to be accounted for by the difference of time which the bonds had to run, or by exemption from taxation. I should be surprised to learn that either bond was not a proper investment. If they were all proper investments, the difference in price could not be referred to difference in interest.

Again, if the fiction of safety be adopted, I still do not see why it does not follow that if a bond is bought below par, the tenant for life is equally entitled to an annual increment on the interest re-

ceived by him as the bond gradually approaches maturity. This was argued in *Hemenway v. Hemenway*, but I must believe that such a doctrine would disconcert trustees not a little. Of course it would call for sales of capital from time to time to produce funds for the tenant for life beyond the amount received on the bonds. There is a well-known bond which was purchased by trustees a few years ago at fifty per cent, and which now stands at one hundred and twenty or over. How is a case like that to be dealt with?

If it be said that the consequences suggested follow only upon an attempt to carry logic too far, and that they are to be controlled by practical judgment, I agree. But I think that the same thing ought to be true of the step now taken, as I have said already. If we are to start with a fiction and then apply logic, I think these results follow. If we are to use our judgment, I do not see why we should not use it at every step, and I believe that to make the tables referred to the universal arbiter between tenant for life and remainderman is not so near an approach to justice as we may hope to reach. I am much more disposed to regard trustees as a sort of domestic tribunal, *ex necessitate*, between the parties, subject to the control of the courts in case of a want of good faith or reasonable judgment.

Finally I must repeat what was said in *Hemenway v. Hemenway*, after an elaborate examination of the English books, that in my opinion the English cases do not apply the principle of wasting investments to premiums on authorized permanent investments. But even if they did, I should consider that in view of the latitude of investment allowed in Massachusetts, and the great fluctuations of American securities, it would be undesirable to accept that principle at present, and still more so, to adopt the simple device of the tables as the means of working out that principle.

I express no opinion upon the question of jurisdiction, which I have not thought it necessary to examine, as both parties desire to have the case dealt with upon its merits now.

I am authorized to state that the chief justice and Mr. Justice CHARLES ALLEN concur in views which I have expressed.

The case was argued at the bar in November, 1884, and re-argued in November, 1885.

Judgment accordingly.

Borden v. Jenks.

BORDEN V. JENKS.

(140 Mass. 502.)

Will — legacy in lieu of dower — preference.

A pecuniary legacy to the testator's widow, accepted by her, must be paid not only in preference to general legacies, but if the abatement of those proves insufficient, in preference, first, to specific bequests, and second, to specific devises.

BILL for instruction of executors in payment of a trust. The head-note states the point. The court below held that specific bequests and devises should not abate.

E. H. Bennett, for Amy Jenks.

T. M. Stetson, for George A. Jenks.

DEVENS, J. This provision made for the widow by the testator is not in terms declared to be in lieu of dower; but as by the statute of Massachusetts, when provision is made for a widow by the will of a deceased husband, she is not entitled to dower, unless it plainly appears thereby that such was the intention, her failure to waive the provisions of the will operates as an acceptance of them, and places her in the same position as if such provisions had been expressly declared to be in lieu of dower. Pub. Stats., ch. 127, §§ 18, 20; *Towle v. Swasey*, 106 Mass. 100.

The widow is a purchaser for value in accepting the provisions of the will, and is not treated as a gratuitous object of the testator's bounty. By relinquishment of her dower, the estate acquires a valuable right of property. Whether the provision be more or less, so far as the testator, the widow, and all pure beneficiaries under the will are concerned, it is the right of the testator to affix what consideration he pleases for the relinquishment of dower, and for the widow to accept or reject it. Whether as against creditors, a provision in lieu of dower far exceeding its value could be held good, need not now be discussed.

The right of the widow to priority in the payment of the legacy which she takes in consideration of relinquishment of dower is so well established that it hardly requires the citation of authorities. *Burridge v. Bradyl*, 1 P. Wms. 127; *Blower v. Morrel*, 2 Ves. Sen.

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420; *Norcott v. Gordon*, 14 Sim. 258; *Williamson v. Williamson*, 6 Paige, 298, 304; *Pollard v. Pollard*, 1 Allen, 490; *Toule v. Swasey*, *ubi supra*; *Farnam v. Bascom*, 122 Mass. 282, 289. It seems to be equally established that where a widow has no dower interest, as when she is provided for by a jointure or other settlement in lieu thereof, she obtains no precedence, but shares equally with other pecuniary legatees. *Roper v. Roper*, 3 Ch. Div. 714; *Acey v. Simpson*, 5 Beav. 35.

It follows from these principles that where a wife is entitled, as she is under the laws of Massachusetts, to a share in the personal property of the husband, of which she cannot be deprived by will, the relinquishment of such right entitles her to receive the legacy given in consideration thereof in preference to those who are pure beneficiaries. *Farnum v. Bascom*, *ubi supra*. The position which she occupies in regard to such a legacy may be different, so far as creditors are concerned, as her right is independent of theirs in the one case, and subject thereto in the other.

It is not disputed, in the case at bar, that the widow is entitled to payment of her pecuniary legacy from the personal property which has been generally bequeathed, to the exclusion of the other legatees; but it is contended that neither the personal chattels specifically bequeathed to George A. Jenks, nor the land devised to him, should such personal chattels prove insufficient, can be applied to the payment of the legacy to the widow.

Whether one devise or bequest is to be postponed to another is a question of intention. The provision which a testator makes for his widow may be in any form he chooses, as the wife may or may not accept, as she pleases. It may be charged solely on personal or real estate distinctly specified; it may be made subject to, or preferred above, other legacies; or that which is given may be charged with payments or liabilities to others.

Where a specific thing is given, the legacy certainly differs from a general donation, which may be satisfied from many sources. If the thing exists, the donee receives it; if not, no other portion of the testator's property is charged with the payment of its value. The contention of George A. Jenks is therefore that as the farm and personal property thereon were specifically devised and bequeathed to him, even if Mrs. Jenks was in a sense a purchaser for value in that she relinquished her right of dower and her rights in the personal property, which could not otherwise have been taken from her in favor of any pure beneficiaries, yet she is not entitled to look

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to the real and personal estate thus specifically bequeathed to others. The widow must be held to have accepted the provisions of the will according to their legal meaning; and the question therefore is whether the true interpretation is that they were or were not subject to the other specific legacies. The principle on which it is held that provisions of a will accepted by a widow are to be carried out, if necessary, to the exclusion of all pure beneficiaries, requires that the same rule should be applied where legacies are specific, there being no general legacies from which these provisions can be satisfied. So long as there are general legacies, the specific legacies should be relieved; but as the provision for the widow satisfies a legal demand against the estate which could not otherwise be met, it should properly take precedence of everything which is pure bounty. *Pollard v. Pollard, ubi supra.*

That specific legacies must be held to abate, as well as general legacies, in favor of the provision made for a widow, appears to have been distinctly held in *Loock v. Clarkson*, 1 Desaus. Eq. 471, in *Stuart v. Carson*, 1 Desaus. Eq. 500, and in *Clayton v. Aikin*, 38 Ga. 320.

In other cases where some of the legacies were specific and others general, it has been held that the provision for the widow was entitled to priority, apparently without suggestion that any difference could exist between the two classes, so far as this priority was concerned, whatever difference there might be among the legatees *inter sese*. *Reed v. Reed*, 9 Watts, 263; *Lord v. Lord*, 23 Conn. 327.

The statement of facts in *Pollard v. Pollard, ubi supra*, terms the other bequest "specific," but as the first clause of the will provided that the executor should sell and convert into money all the real and personal property of the testator, it is probable that the word was wrongly used instead of "definite," or some similar term. As the opinion does not deal distinctly with the question of priority, in case the other legacies had been of articles or parcels of property specifically described, the opinion cannot be said to be decisive of the question before us, but the principle there established is of great weight in determining it. It is there decided that the widow always takes as a purchaser when she relinquishes her rights, and is not to be deemed merely a beneficiary in marshalling the assets.

A similar principle has been applied where a devise has been made to the husband by reason of his relinquishment of his legal rights in personal property of the wife. In *Farnum v. Bascom, ubi*

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supra, all legacies and devises were specific, including a life interest to the husband of the testatrix in her real estate, he not being a tenant by curtesy therein. He was entitled to one-half of her personal property; of this he could not have been deprived by her will, except with his own assent. Gen. Stats., chap. 108, §§ 9, 10. His assent was accompanied by a devise to him of this life estate. It was held, that until all the other specific legacies and devises were exhausted, no resort for the payment of debts could be had to the life estate devised to the husband. It was further said that it was not important whether that which the husband was to receive was or was not an exact equivalent of that which he relinquished. It was sufficient if the testatrix saw fit so to treat it. In *Farnum v. Bascom*, the devise to the husband was indeed specific, but the ground upon which it was given a priority over other specific legacies, they being required to contribute to the payment of the debts, while it was not, equally exists when the legacy is general in its terms. It is a testamentary gift founded on a valuable consideration, and is thus entitled to preference. *Richardson v. Hall*, 124 Mass. 228.

In *McLean v. Robertson*, 126 Mass. 537, a legacy of a fixed sum of money was given by a testatrix, in consideration of a debt which she deemed it her duty equitably to pay. There were also other bequests of specific sums of money to pure beneficiaries. It was held that the language of the will, by which all the specific bequests of money were to abate proportionally in case of a deficiency of assets, was not to be applied to this legacy, in view of the intention of the testatrix to pay a debt by it which she held it incumbent on her to do.

It is contended on behalf of George A. Jenks, that the true meaning of the gift is as if it were written, "I give to my widow \$2,000 out of my personal estate not specifically bequeathed." But in view of the valuable consideration she pays, she is to be treated as a *quasi* creditor, and as the gift relieves the estate of the testator from a proper charge thereon, the testator must be held to have intended, in the absence of direction to the contrary, that it should be paid out of any property which he had to bequeath or devise, of course in the order in which that property was properly to be subjected to charge. The legacy of personal chattels specifically bequeathed to George A. Jenks must therefore abate, and if necessary, the specific devise of the land, in order to satisfy the legacy to the widow.

Decree accordingly.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

PIRANO V. STATE.

(30 Tex. Ct. App. 120.)

Criminal law — former jeopardy — postponement after impanelling of jury and plea.

A jury was impanelled and sworn, the indictment was read, and the prisoner pleaded not guilty. Then the State's attorney moved to postpone till a later day of the same term, on the ground that his witnesses were not in court. The prisoner objected, but the motion was granted and the jury discharged. *Held*, that the prisoner was in jeopardy, and could not again be put on trial even at the same term.

CONVICTION of unlawfully branding a calf. The opinion states the case.

W. A. Crafts, for appellant.

J. O. Burts, assistant attorney-general, for State.

WHITE, P. J. Appellant was convicted in the lower court and given two years in the penitentiary upon a prosecution for illegally branding a calf. A decision of one question will dispose of the case on this appeal. This question is presented by appellant's first bill of exceptions, which after stating the case, is as follows, viz.:

“ Be it remembered that upon the trial of this cause the following proceedings were had: On this 23d day of October, 1885, this cause being regularly reached and duly called for trial, came the State by the district attorney and the defendant in person and by his counsel, and both parties having announced ready for trial, came also a jury of twelve good and lawful men of Cameron county, to-wit, John Notus and eleven others, who were duly impanelled, tried and sworn according to law, and thereupon the indictment against the defendant herein was duly read to the jury and the defendant required to plead thereto, and thereupon he, the defendant, pleaded not guilty; and thereafter the district attorney moved the court to postpone the trial of this cause to another day of this term, and discharge the jury from the further consideration thereof; to which defendant objected, because he was already on trial and in jeopardy, which objection the court overruled; and the court then granted the postponement of this cause and discharged the jury from all further consideration thereof; to which ruling and action of the court the defendant duly excepted in open court at the time the same was made and done, and time therefor being allowed this bill embodying such exception is now prepared and presented in open court for allowance, and after having been duly submitted to counsel for the State it is allowed, signed and ordered to be made a part of the record of this cause. So done and ordered in open court on this the 23d day of October, 1885, with the following explanation (viz., that) the district attorney having discovered that his material witness, without whom he could not proceed, was absent, and having announced for trial under the belief such witness was present in court, having been so informed by the sheriff.

(Signed)

“ J. C. RUSSELL,

“ *Judge 28th Jud. District.*”

This exception, it will be noticed, was reserved to the action of the court upon the first trial. As a precautionary measure, in order to perpetuate the facts, it was perhaps well enough that the exception was then saved, but a saving of such bill at that time was by no means an essential requisite to the right to plead and establish jeopardy in a subsequent trial. For as was said by the Supreme Court of Mississippi, where such exception had not been taken on the first trial: “It could never have been intended that a man should have excepted in the court below to something obviously for his own benefit. He did object * * * when placed

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upon trial for the same offense at the next term, which was as soon as he was called upon to do so." *Whitten v. State*, 61 Miss. 717.

Three days after the discharge of the jury and postponement of the case, it was again called for trial and a new jury impanelled, when the defendant pleaded not guilty and former jeopardy. On motion of the district attorney the plea of former jeopardy was stricken out because filed after the impanelling of the jury and the entering of a plea of not guilty by the defendant. Now, our Code of Criminal Procedure is entirely silent and makes no mention of such a plea as that of "former jeopardy," and yet it is expressly declared by our Constitution, in the fourteenth section of the Bill of Rights, that "no person for the same offense shall be twice put in jeopardy of life and liberty." No time or order of pleading is anywhere provided for this plea, and yet will any one claim that the silence of the Code or arbitrary rules with regard to other defenses can apply so as to render nugatory or defeat a right to such plea and defense. The court held otherwise in express terms in *Blandford's* case, 10 Tex. Ct. App. 627. It is true that the discussion of this particular question in that case was *obiter dicta*, yet nevertheless the enunciations of the principle therein contained are sound propositions of law. We are of opinion that the court committed an error in holding that the plea was not filed at the proper time and in due order of pleading, and for that reason striking it out and depriving the defendant of the benefit of it.

The question then is, was the plea a good one in law? As to the facts there can be no question; they are fully stated in the bill of exceptions copied above. Was defendant in jeopardy when the case was first postponed and the jury discharged? If so, then he could not be placed in jeopardy a second time for the same offense, if the jury were improperly or illegally discharged.

What is a proper construction to be placed upon the term "jeopardy," as used in the Constitution, and what does it mean? This is fully explained in *Powell's* case, 17 Tex. Ct. App. 345, wherein it was held that "when a person has been placed upon his trial upon a valid indictment for an offense involving life or liberty, in a competent court, and a competent jury has been impanelled, sworn and charged with his case, he is 'put in jeopardy' within the meaning of the said constitutional provision, and from a repetition thereof upon the same indictment, or upon any other indictment for the same offense, this constitutional shield forever protects him.

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Wherefore after jeopardy has once so attached, if without lawful authority the trial court discharges the jury without his consent, and before verdict, he cannot legally be tried again for the same offense." Most of the leading authorities may be found collated in the two opinions in *Powell's* case. Since the decision of that case we have had access to several decisions rendered in other States subsequently, to which we will refer.

In *Whitten v. State*, 61 Miss. 717, decided in 1884, where the jury were discharged by the court over objection of defendant for failing to agree in a murder case when the jury had only been out considering the case three and a half hours (the same length of time as in the *Powell* case), the court say, "but we have found no case where upon a charge of felony a deliberation of this length of time was sufficient to authorize a dismissal" (of the jury). In that case it is also said: "But the power to dismiss a jury in prosecutions for a felony can never depend upon pleasure. Such power is wholly dependent upon necessity either physical or legal. Where there is no necessity there is no power. Such unquestionably are our adjudications;" and in conclusion the court hold that in a trial for murder the submission of the case to a lawfully impanelled jury, and the subsequent willful or illegal dismissal of that jury before verdict found, constitute former jeopardy and the prisoner is entitled to a final discharge.

In *Adams v. State*, 99 Ind. 244, decided in 1884, it is said, "it is also well settled that when the ordinary forms of law have been complied with jeopardy attaches when the jury are sworn. 1 Bish. Cr. L., § 1014; 1 Bish. Crim. Proc., § 661; *Maden v. Emmons*, 83 Ind. 331. When jeopardy has begun and the jury are unnecessarily discharged without the consent of the prisoner, such a discharge of the jury is the equivalent of an acquittal, and the prisoner thereby becomes entitled to exemption from further prosecution for the same offense." *Wright v. State*, 5 Ind. 290; s. c., 61 Am. Dec. 90; *Wright v. State*, 7 Ind. 324. In that case it was held, "if after a jury is impanelled and sworn it be disclosed that a juror is incompetent because not a freeholder or householder, and the accused declines to object to the juror, and thereupon the court of its own motion discharged the jury, the accused has been once in jeopardy and should be released." See same case reported in 4 Am. Rep. 309.

In *Whitmore v. State*, 43 Ark. 271, it is held that "a prisoner is

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in jeopardy from the time that the jury is impanelled and sworn in a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction, and the entry of a *nolle prosequi* or discharge of a juror after that, without his consent, operates as an acquittal except in cases of overruling necessity, as the death or illness of the judge or a juror."

Mitchell v. State, 42 Ohio St. 383, decided in 1884, is one of the ablest and most elaborate opinions of recent date upon former jeopardy. Upon the point under consideration it is said, "nothing is more clearly settled than that the jeopardy attaches the moment the jury is sworn, and that if the jury be thereafter discharged without a verdict where no legal ground of discharge is shown, the effect will be precisely the same as if a verdict of acquittal had been rendered." Citing 6 Ohio, 399; 14 Ohio, 295; 3 Ohio Stat. 230; 12 Ohio Stat. 214; 14 Ohio Stat. 493; 15 Ohio Stat. 155; 24 Ohio Stat. 134; 1 Bish. Cr. L., §§ 1015, 1016.

In *People v. Dolan*, 51 Mich., 610, it was held that "after the jury in a criminal case was sworn, the prosecuting attorney having been allowed a peremptory challenge, and a new juror being chosen and the jury again sworn, that so long as the jury first sworn was not legally discharged there could not be two juries sworn to try the same case, and a conviction by the latter jury was set aside and the prisoner discharged." s. c., 4 Am. Crim. Rep. 308. These are the latest expressions from the various courts which we have seen published upon the subject.

Now how stands the case at bar in the light of these authorities? Was there any necessity for the discharge of the first jury impanelled in this case, and was the discharge a legal one?

The ground of discharge was that the principal State's witness, and without whom the State could not make out her case, was absent, and the prosecution was taken by surprise, the announcement of ready having been based upon information from the sheriff that said witness was present. Our statute provides that a "continuance may be granted on application of the State or defendant after the trial has commenced, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had; or the trial may be postponed to a subsequent day of the term." Code Crim. Proc., art. 568.

Ex parte Gregory.

Waiving the question as to whether the facts stated showed an "unexpected occurrence which no reasonable diligence could have anticipated," we are of opinion that the statute never could have contemplated that the jury impanelled should be discharged when the case was simply postponed to a subsequent day of the term, or that it should be discharged even in case of a continuance for the term, except upon the clearest showing of a necessity therefor. To hold that such could be done would be to make the statute contravene and render nugatory the constitutional guaranty against jeopardy.

In this case, when the postponement was granted, the jury should have been kept together in charge of an officer until the witness could be brought into court and the trial renewed. The witness was a resident of the county in which the trial was progressing; the postponement was only for three days. Proper diligence on the part of officers could doubtless have had him in court in a few hours. Most clearly to our minds there was no necessity for a discharge of the jury; and the discharge under the circumstances detailed in the bill of exceptions was equivalent to a verdict of acquittal of the prisoner, and constituted such jeopardy under the constitutional provision as that he could not again be subjected to a second trial for the same offense.

The judgment of the court below is reversed, and the appellant will be discharged from further liability under the indictment, and the prosecution against him is dismissed.

Reversed and dismissed.

EX PARTE GREGORY.

(30 Tex. Ct. App. 210.)

Municipal corporation — ordinance — hack license.

An ordinance requiring every owner of a hack to take out a license at \$2 per annum, and pay the cost of numbering the hack, not exceeding twenty-five cents, is valid. (*See note, p. 528.*)

HABEAS CORPUS. Arrest for running a hack without a license.

Trezevant & Franklin, for relator.

George P. Finlay, city attorney of Galveston, *contra*.

Ex parte Gregory.

WILSON, J. W. E. Gregory having been arrested and being in custody of M. M. Jordan, chief of police of the city of Galveston, by virtue of a warrant of arrest issued by the recorder of said city, upon a complaint charging said Gregory with a violation of section 2 of ordinance No. 5, of said city, to-wit, charging him with running a hack without license, he applied to this court for the writ of *habeas corpus*, alleging that his restraint was illegal. We at first declined to grant the writ, because, in our opinion, the criminal District Court of the counties of Galveston and Harris had jurisdiction to grant the same primarily, and the application had not been presented to the judge of that court. Thereafter the application was presented to the Hon. Gustav Cook, the judge of said court, and he indorsed thereon as follows:

“It appearing that the question involved is one of importance not only to the relator but to the city of Galveston, and as in case of the discharge of the relator, there would be no such authoritative decision of the question as is much to be desired, I respectfully suggest that the petition be presented to the Court of Appeals in the first instance. This 16th January, 1886.

“GUSTAV COOK,
“Judge Cr. D. C. G. & H. Cos.

Upon a second presentation of the application with the foregoing indorsement thereon to this court, appreciating the force of Judge Cook's suggestions, and believing that it would be for the public good to have the question at once and finally determined, we granted the writ, and have entertained a hearing of the same.

The ordinance in question was approved November 4, 1879, and is entitled “An ordinance to regulate and provide for the licensing of all persons and corporations keeping for public or private use or hire hacks, coaches, carriages, buggies, drays, carts, wagons or other vehicles in the city of Galveston.” This ordinance appears in the Revised Ordinances of the city of Galveston, adopted October 12, 1883, as chapter V, article I, with the caption “Hacks, Drays and other Vehicles.” Its provisions are preceded by a preamble as follows: “Whereas it is deemed necessary for the better preservation of public order, and enforcement of police regulations, and for the purpose of providing funds for making necessary improvements upon the streets, alleys and avenue of the city; therefore be it ordained,” etc.

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Section 1 of this ordinance makes it unlawful for any person, firm or corporation to run or keep for public or private use or hire any of the vehicles named in section 2, without having first obtained a license therefor, and given a bond, and paid the license dues prescribed by said ordinance.

Section 2 designates the vehicles required to be licensed, and prescribes the license dues, the requisites of the license and bond, etc. It fixes the license dues upon a hack at the sum of \$8 annually, and fixes said dues upon other vehicles at different sums, ranging from \$2.50 to \$12. It also requires the owner of the vehicle to pay the cost of numbering the same, not to exceed twenty-five cents. The penalty for a violation of the preceding sections is prescribed by section 29, and is a fine not less than five nor more than one hundred dollars.

Section 20 provides that all license dues collected under the ordinance, after retaining sufficient amounts to pay the expenses of issuing said licenses and keeping a record thereof, shall be paid into the city treasury, and shall not be used for any other purpose than the improvement of the streets, alleys and avenues of the city.

Section 21 provides that all fines and penalties collected under the provisions of the ordinance shall be used exclusively for the maintenance of the police department.

This ordinance contains thirty sections, and regulates in detail and fully the keeping and running of the vehicles therein specified. It prescribes various fines and penalties for the violation of these regulations, and prescribes the mode of procedure for the enforcement of such regulations.

Authority for the enactment of this ordinance is claimed to be derived from two provisions contained in the charter of the city of Galveston. One of these provisions is section 45, article 1, title IV, and is as follows: "To license, tax and regulate hackmen, draymen, omnibus drivers and drivers of baggage wagons, porters and all others pursuing like occupations, with or without vehicles, and prescribe their compensation, and provide for their protection, and make it a misdemeanor for any person to attempt to defraud them of any legal charge for services rendered, and to regulate, license and restrain runners for steamboats, railroads, stages and public houses."

The other provision is section 81, article 3, title V, and is as follows: "The city council shall have power to levy and collect occu-

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pation taxes both upon natural persons and upon corporations doing any business in said city, and to impose and collect license taxes upon both natural persons and corporations keeping for public or private use hacks, coaches, carriages, buggies, drays, carts, wagons, street railroad cars, or other vehicles employed in said city, or carrying on therein any business the regulation or restraint of which may be necessary and proper to preserve public order or enforce police regulations, and may require such occupation and license taxes to be paid in advance by such persons and corporations before carrying on such business or keeping such vehicles as aforesaid, and by suitable penalties punish the violation or evasion of any ordinance or ordinances adopted in pursuance of this section; provided however, that all such taxes shall be equal and uniform upon the same class of subjects; provided, further, that a separate license shall be taken out for each establishment, occupation, avocation, business, calling or vehicle; and provided further, that no occupation taxes levied by the city shall exceed, in any one year, one-half the amount levied by the State on the same subject for the same period."

It is contended by the applicant that section 2 of the ordinance is not authorized by, but is in violation of, the foregoing provisions of the charter, in so far as the same levies the taxes therein specified, except the twenty-five cents for cost of numbering a vehicle. Also that to the same extent it is in violation of sections 1 and 2 of article 8 of the Constitution of this State. The position assumed by the applicant is, that the taxes levied by said section 2 of the ordinance, while the same are therein denominated "license dues," are in fact occupation taxes, and being in excess of one-half the occupation tax imposed by the State upon the same class of subjects, are illegal. That the sums thus levied, under the name of "license dues," are not levied for the purpose of regulation but for the purpose of revenue. That the ordinance upon its face shows that such is its purpose. That not only is the purpose of the ordinance to thus provide a revenue, but a revenue for a particular expense other than the expense of licensing, that is, for the improvement of the streets, alleys and avenues of the city, which particular expense has been otherwise specially provided for by the charter of the city, sections 127 and 128 of title 10.

It must be conceded, under the authority of *Ex parte Gregory*, 1 Tex. Ct. App. 753; *Ex parte Slaren*, 3 Tex. Ct. App. 662, that if the sums levied by the ordinance as license dues are in fact occu-

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pation taxes, the levy is in violation of not only the city charter but of the State Constitution. Denominating these sums "license dues" will not of itself make them such if it clearly appears that they are in fact occupation taxes. We must regard the substance and purpose of the ordinance in construing it, rather than its form and language.

In the construction of ordinances, in considering the question of their validity, Mr. Dillon says: "The courts will give them a reasonable construction, and will incline to sustain rather than to overthrow them, and especially is this so where the question depends upon their being reasonable or otherwise. Thus if by one construction an ordinance will be valid, and by another void, the courts will, if possible, adopt the former." 1 Dill. Mun. Corp. (3d ed.), § 420. "When the legislature has conferred full and exclusive jurisdiction on a municipal corporation over a certain subject, the acts of the corporation will be supported by every fair intendment and presumption." *Baltimore v. Clunet*, 23 Md. 449. "In view of the inartificial character of town by-laws, they are especially entitled to a reasonable construction." *Whitlock v. West*, 26 Conn. 406. "The strict rules by which the validity of penal statutes are to be tested are not to be applied to the by-laws or ordinances of municipal corporations. It has been well remarked that the by-laws of very few of the corporations could stand such a test. They should receive a reasonable construction, and their terms must not be strictly scrutinized for the purpose of making them void." *Municipality v. Cutting*, 4 La. Ann. 335; *Merriam v. New Orleans*, 14 La. Ann. 318.

It is provided in our statute that "in all interpretations the court shall look diligently for the intention of the legislature, keeping in view at all times the old law, the evil, and the remedy." Rev. Stats., art. 3138, subdiv. 6. And our Penal Code provides that "every law upon the subject of crime shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects." Penal Code, art. 9. It will be perceived from the provisions of our statute above quoted, that they are in accord with the rules of construction applicable to ordinances. They contemplate a reasonable construction, that is, a construction which will give effect to the intention of the legislative power enacting the law, and in interpreting the law all reasonable

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intendments which help to sustain and make the law operative are to be indulged and weighed by the court.

Keeping in view these rules of construction, we will first inquire as to the old law, the evil, and the remedy, with reference to the subject-matter of the ordinance in question. The old law is found in the Revised Ordinance of the city of Galveston, adopted in 1875, chapter 39, article II, caption: "Occupation or License Taxes," page 268. Section 33 of that ordinance levies certain annual taxes upon vehicles, which taxes are in excess of one-half the taxes levied by the State upon the same class of subjects. This old ordinance evidently levies these taxes as occupation taxes, for the purpose alone of providing revenue, and has no reference whatever to the regulation of the occupations taxed. In *Ex parte Gregory*, decided by this court in 1877, the validity of the old ordinance was brought in question, and this court held that the tax levied upon a hack by that ordinance was an occupation tax, and being more than one half the State tax upon such occupation, was illegal, and in respect to said tax that said ordinance was void.

In discussing the power of the city under its charter to levy a license tax, the court in that case, referring to the latter portion of section 3, article 3 of title 5 of the city charter, says: "This portion is believed to authorize the city council to regulate the manner of using these vehicles, and could not properly be called an occupation tax, for it applies as well to vehicles used for private use as to those kept for the use of the public; and inasmuch as it is elsewhere provided for taxing these articles as personal property, it can hardly be supposed that the legislature intended to burden the citizen further than as might be necessary to provide for the systematic control and management of this kind of property, with reference to the safety and good order of the public, and incidentally to demand the payment of a sum from each owner to meet the necessary expenses of this regulation." *Ex parte Gregory*, 1 Tex. Ct. App. 753.

This decision virtually annulled the old ordinance with respect to the tax upon vehicles, and left the city without any law or regulation upon the subject. The want of a valid ordinance regulating this subject was the evil which the city council sought to remedy by the ordinance adopted November 4, 1879, — the ordinance the validity of which is brought in question for the first time in this case.

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It must be presumed that in framing and enacting this ordinance the council acted with a knowledge of the Constitution of the State, of the city charter, and of the decision of this court in the Gregory case. It must be presumed that the council intended to conform said ordinance to the requirements of those authorities, so as to make it a valid and effective ordinance. This intent on the part of the council, to avoid the objections which obtained against the former ordinance, and to bring the present ordinance within the limits of legitimate legislation, is quite manifest not only from the circumstances under which the new ordinance was framed and enacted, but also from the title, subject-matter, provisions and language of the ordinance itself. Evidently it was not intended by this ordinance to levy an occupation but a license tax, under the police and not the taxing power conferred upon the council by the charter. Such being the intention of those who framed and adopted the ordinance, that intention must be respected and considered in its interpretation, and every reasonable intendment must be indulged, in furtherance of the accomplishment of such intention.

In our judgment there is nothing in the ordinance which requires it to be construed as levying an occupation tax. The general purpose of the ordinance is that expressed in its title, that is, "to regulate and provide for the licensing of all persons, etc., keeping for public or private use or hire hacks, coaches," etc. Such regulations pertain strictly to the police and not the taxing power of the corporation, and it was under and by virtue of this police power that the council enacted this ordinance, as is evidenced by the title and body of the ordinance. "The title and the body of the ordinance may be taken together to give it the necessary certainty to sustain it." *Martindale v. Palmer*, 52 Ind. 411.

It is urged by counsel for applicant however that the recital in the preamble of the ordinance, that it was enacted "for the purpose of providing funds for making necessary improvements upon the streets, alleys and avenues of the city," conclusively shows that the ordinance is not a police regulation, but is a measure of taxation to raise revenue, and is in effect the levy of an occupation tax. Also, that this construction of the ordinance is borne out by section 20 thereof, which appropriates the principal portion of the license fees collected to the improvement of the streets, alleys and avenues of the city. This argument is not only plausible, but it is forcible and apparently sound. We think however it can be reasonably an-

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swered, so as to sustain in this respect the validity of the ordinance. With regard to the recital in the preamble, above quoted, it is to be noted that the purpose therein stated is not the only purpose of the ordinance, as shown not only by said preamble but by the body of the ordinance. A further purpose is stated in said preamble to be "for the better preservation of public order and enforcement of police regulations," and this appears from the provisions of the ordinance to be the leading, primary and principal purpose for which the ordinance was enacted.

In the interpretation of a statute, though resort may be had to the preamble, it cannot limit or control the express provisions of the statute. *Dwarris Stats.*, 504-508. And the statement of legislative reasons in the preamble will not affect the validity of the statute. *42 Conn.* 583. We are of the opinion therefore that the recital in the preamble to the ordinance, that one of the purposes of the ordinance is to provide a fund for the improvement of streets, etc., cannot be used to invalidate the ordinance, especially when it plainly appears from the title and body of such ordinance, and also from the preamble, that another and paramount purpose of the ordinance is, the better preservation of public order and the enforcement of public regulations concerning vehicles. The purpose of providing a fund is manifestly a secondary, incidental one to that of regulating the subject of vehicles, and must be subordinated to the primary and leading purpose, which is one of police regulation.

With regard to section 20, which sets apart the fund arising from the imposition of the license tax upon vehicles for the improvement of streets, etc., we do not think it can be held to invalidate the ordinance prescribing such license tax. A reasonable interpretation of this would be, that while the expense of enforcing the regulations in regard to vehicles must be paid, it should be paid out of some other fund instead of this particular one, and the appropriation of this particular fund to another purpose would in no way relieve the city from the expense, or any portion thereof, of enforcing the regulations. In other words, the expense of enforcing the regulations must be paid for by the city, and it matters not out of what fund the same is paid. This was a matter within the discretion of the council, and cannot in any way, we think, affect the validity of the ordinance as to the levy of the license tax. It by no means follows that because this particular fund was not set apart exclusively for the payment of the expenses incurred by the police regulation, there-

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fore there are no such expenses, and that therefore the purpose of the tax is for revenue alone, and not for the purpose of police regulation. And section 20, if in conflict with the charter, would be invalid and inoperative, but that fact would not invalidate the other provisions of the ordinance.

These being our views of the intent and purpose of the ordinance in question, we hold that the sums levied thereby, if they be reasonable, are license taxes, levied under and by virtue of the police power of the city council, and are not occupation or other taxes controlled by the limitations of the Constitution of the State, and the charter of the city, with reference to taxation. 15 Kans. 627; 14 Ind. 201; 27 Ind. 223; 4 Cal. 46.

Therefore it only remains to be considered and determined whether the ordinance, when viewed as a police regulation, and as levying a license, and not an occupation or other tax, is valid. The solution of this question depends upon whether or not the sums demanded are reasonable for the purposes of regulation. It is here to be observed that section 81 of the city charter confers the power not only to regulate the keeping and use of vehicles, but also to impose and collect license taxes thereon.

In treating upon this subject Mr. Dillon says: "Concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged." 1 Dill. Mun. Corp. (3d ed.), § 357. The author is speaking with reference to a grant of the power to license, and not of a grant of the twofold power to license and tax, which twofold power, as we have seen, has been conferred upon the municipality of Galveston by its charter. In the previous portion of the section quoted, the author remarks that when the power conferred in the charter is both to license and tax, "unless there is some specific limitation on the authority of the legislature in this respect, such provisions are constitutional." In this State there is a specific constitutional limitation which we think would limit the grant of power to a municipality to levy an occupation or other tax for revenue purposes greater than one-half the tax levied by the State upon the same class of such subjects. But as we have before stated, this constitu-

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tional limitation does not, we think, apply to a license tax prescribed incidentally in connection with and to meet the expenses of police regulations, provided such tax is not unreasonably large so as to be in fact a tax for revenue. This is the view expressed by this court in *Ex parte Slaren*, 3 Tex. Ct. App. 667. It is there held that the constitutional limitation relating to taxation does not affect the power of the legislature to confer upon a municipal corporation the authority to regulate the use of vehicles by such regulations as safety and good order may require, and to impose a sufficient amount of tax to meet the legitimate expense of keeping up such police regulations over the subject. In *Slaren's* case, as in *Ex parte Gregory*, before cited, the ordinance involved levied an occupation tax in excess of the constitutional and charter limitation, and was held invalid for that reason.

Mr. Desty, in his work on Taxation, states that "License fees are not taxes, but prices paid for the privilege of exercising a franchise. It is a tax only when revenue is the main purpose for which they are imposed." 1 Desty Tax. 305.

In *City of Mankato v. Fowler*, 32 Minn. 364, it is said that the fact that the city derives a revenue incidentally from the reasonable exercise of the police power in regulating and controlling the business is no serious objection to an ordinance. "What is a reasonable license fee must depend largely upon the sound discretion of the city council, having reference to all the circumstances and necessities of the case. The general rule is that a reasonable license fee should be intended to cover the expense of issuing it, the services of officers, and other expenses directly or indirectly imposed. Unless, however, the amount is manifestly unreasonable in view of its purpose as a regulation, the court will not adjudge it a tax." The court cites, in support of its views, *City of St. Paul v. Colter*, 12 Minn. 50; 2 Am. and Eng. Corp. Cases, 29; *Van Hook v. Selma*, 70 Ala. 362; s. c., 45 Am. Rep. 85; *Van Baalen v. People*, 40 Mich. 258; s. c., 36 Am. Rep. 522, note.

The case of *Van Hook v. Selma*, *supra*, involved the validity of an ordinance which exacted a license fee of \$10 of all persons selling goods, wares and merchandise. The opinion in that case, delivered by Justice SOMERVILLE, is a clear and exhaustive one, and evidences mature and careful consideration. After citing and reviewing numerous authorities, the court sums up its conclusions as follows: "We declare the true rule to be, in the case of useful trades

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and employments, and *a fortiori* in other cases, that as an exercise of police power merely, the amount exacted for a license, though designed for regulation and not for revenue, is not to be confined to the expense of issuing it; but that a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation, at the place where it is licensed. For this purpose the services of officers may be required, and incidental expenses may be otherwise incurred in the faithful enforcement of such police inspection or superintendence. The rule further applies here, that when the question as to the reasonableness of a municipal by-law or city ordinance is raised, and it has reference to a subject-matter within the corporate jurisdiction, it will be presumed to be reasonable, unless the contrary appears on the face of the law itself, or is established by proper evidence." And the court held that under these principles it could not judicially know that the license fee of \$10 was unreasonable, but that the contrary was presumptively true, and the ordinance was valid. It is conceded in the opinion that there are authorities holding that if the sum required for such license exceeds the expense of issuing it, the act transcends the licensing power, and imposes a tax; at least, in the case of useful trades and employments. But these conflicting authorities are not regarded by the court, in its opinion, as declaring the true rule upon the subject. In our opinion the correct rule is that adopted in this Alabama case, and is supported by the weight of modern American decisions. See *Van Horn v. People*, 46 Mich. 183; s. c., 41 Am. Rep. 159; *St. Louis v. Woodruff*, 71 Mo. 92; *Gartside v. East St. Louis*, 43 Ill. 47; *Kitson v. Ann Arbor*, 26 Mich. 325.

In treating upon the subject of license fees Mr. Cooley says: "When the grant" (of power) "is not made for revenue, but for regulation merely, a much narrower construction is to be applied" than where it confers the power also of raising revenue. But even where it is for regulation merely, "a fee for the license may still be exacted; but it must be such a fee only as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers. * * * But the limitation of the license fee to the necessary expenses will still leave a considerable field for the exercise of discretion, when the amount of the fee is to be determined. * * * In fixing upon the fee it is proper and reason-

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able to take into account, not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much the most important, and indeed are what are principally had in view when the fee is decided upon. * * * And all reasonable intendments must favor the fairness and justice of the fee thus fixed; it will not be held excessive unless it is manifestly something more than a fee for regulation." *Cooley Taxation*, 408, 409, 410. The doctrine thus announced by this great jurist and author is the same declared by the court in *Van Hook v. Selma, supra*, to be the correct rule.

With regard to the reasonableness of the license fee of \$8 imposed by the ordinance under consideration, we cannot say that it is excessive or unreasonable. There is nothing in the ordinance itself which shows it to be unreasonable, and there is no evidence to support such a conclusion. Looking to the provisions of the ordinance, we find that it provides numerous regulations, the enforcement of which must necessarily demand the constant services of the police of the city, as well as the careful attention and supervision of the municipal officers and government. Considering not only the direct but the probable incidental expense of a proper enforcement of the regulations prescribed by the ordinance, it certainly does not appear that the license fees exacted are any thing more than fees for regulation.

Our conclusion and judgment are that the ordinance in question is valid; that the applicant is not illegally restrained of his liberty, and that he be remanded to the custody of the respondent, M. M. Jordan, chief of police of the city of Galveston, and that he pay all costs of this proceeding, for which execution may issue.

We deem it due to counsel in this case to say that we have been greatly aided and enlightened, in our consideration of the questions involved and decided, by their oral arguments and exhaustive citations of authorities. Their thorough investigation of the authorities has relieved us of much labor, and has greatly facilitated our decision. Counsel for applicant cited numerous authorities, in support of their positions, which we have not mentioned in this opinion. Some of these authorities we do not regard as conflicting with the views we have expressed, when considered with reference to the facts upon which they are based. Others of them are in conflict

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with our views, and in conflict, we think, with the weight of authority.

Ordered accordingly.

NOTE BY THE REPORTER. — In *United States Distilling Company v. City of Chicago*, 112 Ill. 19, it was held that a city ordinance providing that no one shall carry on the business of brewer or distiller within the limits of the city without first paying a license therefor in the sum of \$500 per annum, under a penalty of not less than \$100 nor more than \$200 for each and every offense, is valid. The court said. "This clause of the statute has been the subject of frequent construction in this court, so that most questions raised and discussed on the present record have been settled by previous decisions. It will not be necessary to enter anew upon the discussion. All that is necessary to be done, is to refer to some of the most recent cases: *Howland v. Chicago*, 108 Ill. 496; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Braun v. Chicago*, 110 Ill. 186. In *Braun v. Chicago*, it was distinctly held a license fee imposed by a city or village in pursuance of the section of the statute cited, upon certain avocations, trades, business or occupations carried on within the corporate limits of such city or village, is not a tax, in the constitutional sense of that term, and is not repugnant to section 1, article 9, of the Constitution. It has been so repeatedly and uniformly held that a license fee such as is imposed by the ordinance in this case, is not a tax in the constitutional sense, it ought now to be regarded as settled law. The case at bar comes precisely within the doctrine of the previous decisions on this subject, and the court has no desire or inclination to reconsider the same.

"A point made on the argument is, if the penalty imposed by the ordinance is to be held valid because the sum exacted is a license fee, then it is said it must be tested by principles which govern the exercise of the police power, and under that power only a reasonable fee for the license, or the labor of issuing it, can be charged. This view of the law cannot be adopted. Under the comprehensive grant of power from the legislature, the city council has authority to require parties exercising certain avocations and callings, to pay a license fee for the privilege, and on observing constitutional restrictions, the amount would seem to be within the discretion of the body imposing it. Even the imposition of license fees for substantial municipal revenue has been sustained by this court in a number of cases, as in *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560."

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HARRISON V. STATE.

(20 Tex. Ct. App. 337)

Criminal law — burglary — entry.

Pushing up a trap-door in a floor a foot is sufficient to constitute a burglarious entry.*

CONVICTION of burglary. The opinion states the case.

H. P. Teague, for appellant.

J. H. Burts, assistant attorney-general, for State.

HURT, J. This is a conviction for burglary, by entering a mill house with intent to commit theft.

The only question presented deemed worthy of discussion is whether the proof shows a burglarious entry, or rather was there in law an entry at all.

From the evidence it appears that there was a trap-door in the floor which opened upward on hinges. The proprietor of the mill, because of prior depredations of like character, suspected other burglarious attempts, and to prevent their success, placed over the trap-door "a spring gun." In order to fire this gun the door would have to be raised about twelve inches. On the night of the attempted burglary and theft, one of the party of would-be burglars placed his hand under the door and raised it, and while pushing the door upward the gun fired. Next morning the door was partly open, being held in that position by a sack of flour which had been placed on it, and which had evidently caught under the edge of the door when the gun fired and it fell back.

As before suggested, did this act constitute an entry within the meaning of the statute? "An entry is not confined to the entrance of the whole body; it may consist of the entry of any part, for the purpose of committing a felony."

When the door was raised, say twelve inches, the hand that raised the door was in the house, and by virtue of the above excerpt from the statute, we think the entry was complete. This view is most

* See *Timmons v. State* (24 Ohio St. 426), 32 Am. Rep. 376; *Walker v. State* (68 Ala. 49), 35 Am. Rep. 1.

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evidently sustained by the opinion in *Franco v. State*, 42 Texas, 276. In that case the hand was introduced for the purpose of effecting an entrance by the whole body, for the purpose of raising the window—a breaking at law, through which the party might in fact enter. The primary intent being a breaking by raising the window, the ultimate intent being a felony, the court held such entry complete and burglarious.

The judgment is affirmed.

Judgment affirmed.

BLUM V. STATE.

(20 Tex. Ct. App. 573.)

Criminal law — false pretences.

The defendant had for a year bought goods of the prosecutor on credit, upon the faith of his ownership of a grocery and bakery. He secretly transferred the establishment to his wife and step-daughter in payment of a debt he owed them. Immediately thereafter his wife and father-in-law purchased goods of the prosecutor and others, having them charged to the defendant, the defendant not being present. The prosecutor did not know of the transfer, and gave the credit on the faith of continued ownership. *Held*, that the defendant was not guilty of swindling.

CONVICTION of swindling. The opinion states the case.

Beale & Astry, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. This appeal is from a judgment of conviction upon an indictment for swindling, brought under article 790 of the Penal Code.

In the view we take of the case it will be unnecessary to discuss the several questions raised in the motion in arrest of judgment as to the sufficiency of the indictment. We may, in fact, concede that the indictment, in its formal averments, is sufficient to charge the offense of swindling, as far as the facts averred can constitute that crime. Still in our opinion the sole question to be determined is, do the facts averred and the facts as proven constitute swindling, under the law?

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Article 790 of the Penal Code reads: "Swindling is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same."

To briefly state the substance of the charge as alleged in the indictment, it is as follows: Defendant obtained goods from one Goodman by means of false and fraudulent pretenses and devices. These pretenses and devices grew out of and were practiced by defendant under the following circumstances, viz: That for some time prior to the 21st day of December, 1885, defendant had represented himself to be and was the owner, director and manager of a certain bakery and grocery establishment in the city of Corsicana. That upon the faith of his possession and ownership of the property so connected with the business aforesaid, he had, for a period of more than one year, been in the habit of buying goods on credit from Goodman, the prosecutor, and others. That on said 21st day of December, defendant sold and transferred his entire property connected with his bakery and grocery business to his wife and step-daughter, and kept the fact of this sale and transfer secret for purpose of deception and fraud, in that he might still continue to purchase goods on a credit. That on account of said false pretense and device, he deceived the said Goodman, who was thereby induced to sell him goods on a credit, etc., after the sale and execution of the deed of transfer of all his property to his wife and step-daughter. These were the averments.

As developed by the facts proven, it appears that defendant had been in the habit of buying goods, etc., on a credit prior to the twenty-first of December. He had also used in his bakery and grocery business something over \$1,800 in money belonging to his wife and step-daughter. To secure these latter, or to pay them this debt, defendant on the twenty-first of December, executed a deed of sale to all of his property. This deed was executed in the forenoon, and when defendant left it with the clerk for registration he requested the clerk to say nothing about it, as if known, it might affect or hurt him in his business. That same day, and perhaps subsequently to the acknowledgment and registration of the deed, defendant's wife and father-in-law started out on quite an extensive

purchasing tour, visiting several stores and business houses, and buying quite a quantity of goods at each house, regardless of the prices of the articles bought, and having the bills so made charged to defendant. Defendant was not present in a single instance when the goods were thus bought, though he may have sent his boy down to Goodman's to hurry up the goods bought of him. When Goodman sold these goods (from his previous dealings with defendant and representations previous made him by defendant, and the fact that he was ignorant of defendant's sale of his property to his wife and step-daughter), he was still of the impression and belief that defendant owned the property, and would not have extended him the credit had he known that such was not the case. In brief, these are the main facts developed by the evidence. Do these facts establish a case of swindling under the law?

To constitute the offense described in article 790 of our Code, four things are necessary. 1st, the intent to defraud; 2d, an actual act of fraud committed; 3d, false pretenses; and 4th, the fraud must be committed or accomplished by means of the false pretenses made use of for the purpose; that is, they must be the cause which induced the owner to part with his property. *Com. v. Drew*, 19 Pick. 179; *Com. v. Warren*, 6 Mass. 72; *Desty Am. Crim. L.*, § 149a; *Buckalew v. State*, 11 Tex. Ct. App. 352. There must be an intent to cheat or defraud. This may be inferred from a false representation, however. 13 Wend. 87; 2 Whart. Crim. L. (8th ed.), § 1184.

With regard to the false pretense, the pretense must consist of a statement of some pretended existing fact, made for the purpose of inducing the prosecutor to part with his property; no statement of any thing to take place in future will be a pretense within the act. 2 Archbold Crim. Prac. & Plead. (8th ed.) side p. 465; *Johnson v. State*, 41 Tex. 65; *Allen v. State*, 16 Tex. Ct. App. 150; 2 Whart. Cr. L. (8th ed.), § 1173.

“It may be laid down as a general rule of the interpretation of the words ‘by some false pretense,’ which are used in the statutes, that whenever a person fraudulently represents as an existing fact that which is not an existing fact, and so gets money and etc., that is an offense within the act.” 1 Bouv. L. Dic., “False Pretenses.” But “it is not necessary that the pretense or pretenses should be in words; there may be a sufficient false pretense, within the meaning of the act, to be implied from the acts and conduct of the party,

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without any verbal representation of a false or fraudulent nature." 2 Arch. Cr. Prac. & Plead. (8th ed.) 1386. The conduct and acts of the party will be sufficient without any verbal assertion. 2 Whart. Cr. L., § 1170. "Any designed misrepresentation of existing conditions by which a party obtains goods of another is within the statute." 2 Whart. C. L., § 1135.

Another rule which seems to be well settled is that "where two or more persons are jointly indicted for obtaining goods by false pretenses made designedly and with intent to defraud, evidence that one of them, with the knowledge, approbation, concurrence and direction of the other, made the false pretenses charged, warrants the conviction of both." 2 Whart. Cr. L., § 1171.

Again "it must appear by evidence that the prosecutor parted with his property by reason of the false pretenses alleged, and of that alone." This is the rule announced by Mr. Archbold in his work on Criminal Practice and Pleading, 2d vol. (8th ed.), 1398. But the rule has been held otherwise by some of the courts in this country, as for instance *People v. Haynes*, 14 Wend. 547; s. c., 28 Am. Dec. 530, where it was held that "it is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner should have been induced to part with his property solely and entirely by pretenses which were false; nor need the pretenses be the paramount cause of the delivery. It is sufficient if they are a part of the moving cause, and without them the prosecutor would not have parted with his property." See also *In re Snyder*, 17 Kans. 543; s. c., 2 Am. Cr. R. (Hawley), 228.

In *Smith v. State*, 55 Miss. 513, it is held: "It is not necessary that the false pretenses should be the sole inducement which moved the prosecutor to part with his property. It is sufficient that they materially contributed to this end, and that without them he would not have parted with his property." s. c., 3 Am. Crim. Rep. (Hawley) 92.

"A man whose sole will procures a transaction is a principal, whatever physical agencies he employs, whether he is present or absent when the thing is done." But the false pretense must operate as the direct cause of the transfer of "the goods, and to hold a party liable for goods thus obtained for defendant in accordance with his direction; if so, it is no defense that they were obtained immediately through a contract which the defendant's false pretense induced the prosecutor to make." 2 Whart. Crim. Law (8th ed.), § 1180.

Again it may be stated as a rule "that false representations as to defendant's financial condition, made to induce a sale of goods, constitutes the offense of obtaining property by false pretenses." *State v. Neimeier*, 66 Iowa, 634.

Another rule is "that a bargaining party also implies the existence of the conditions on which the other party depended when entering into the transactions, but at the same time it must be remembered that a bare entrance into a particular transaction is not in itself such an affirmation of the opinion of the other contracting party as to amount to a false pretense, even though the transaction be entered into fraudulently. A mere use of another's error will not make a false pretense, unless there is something done by the deceiving party to confirm such error." See note to section 1170, 2 Whart. Am. Crim. Law.

We have thus stated the principles of law which we think applicable to the facts of this case as shown by the record. Now, upon these rules of law has the prosecution made out a case against this appellant? We are constrained to say that we do not think it has. No false pretenses in words are claimed to have been made by this appellant; for he was not present in person, and no false pretenses and declarations are shown to have been made by the wife and father-in-law who acted as his agents in the purchase of the goods. That Goodman may have entertained the opinion that the appellant still owned the property in the bakery and grocery, and made the sale upon the belief that he still owned said property, cannot affect the question unless the acts of the parties purchasing the goods induced that belief at the time. It was simply an error of opinion upon his part; and a knowledge of the fact that he was acting upon such belief or opinion, without correcting it, will not subject the defendant or his agents to a charge of having made a false pretense by withholding the information which would have corrected his belief. It was his own opinion as to the existence of a fact which did not exist, and not the acts, declarations or representations of the parties with whom he was trading, which caused him to be deceived.

In *Commonwealth v. Grady*, 13 Bush, 285; s. o., 26 Am. Rep. 192, it is held that "a false statement that a house and lot were unincumbered, when in fact they were subject to a recorded mortgage, is not a false pretense within the statute because the party defrauded had the means of detecting it at hand, and might have protected

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himself by the exercise of common prudence." s. c., 2 Am. Crim. Rep. (Hawley), 105. It is unnecessary that we should go in this case to the extent to which the Kentucky court has gone in said case, because no direct, positive declaration or representation was made to Goodman by any of the parties, with regard to the condition of the property at the time of the purchase of the goods.

Our conclusion of the whole matter is that a case of obtaining goods by false pretenses has neither been stated by the indictment nor established by the proofs adduced on the trial of this case; wherefore the judgment is reversed and the prosecution is dismissed.

Judgment reversed and dismissed.

JOHNSON V. STATE.

(30 Tex. Ct. App. 609.)

Criminal law — incest — step-father and step-daughter.

Incest between step-father and step-daughter cannot be committed after the death of the step-daughter's mother

CONVICTION of incest. The head-note states the point.

Ponton & Fly, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. It is conclusively shown by the evidence that no act of carnal intercourse between the defendant and the prosecutrix Kinzie, occurred prior to the death of Kinzie's mother. In his charge to the jury the learned judge, in substance, instructed that carnal intercourse between defendant and Kinzie would be incest although such intercourse did not occur until after the death of said Kinzie's mother.

We are of the opinion that this view of the law is incorrect. During the existence of the marriage relation between defendant and Kinzie's mother carnal intercourse between defendant and Kinzie would unquestionably have been incestuous. Kinzie was then his wife's daughter. But after the death of the mother and

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wife, the relation of step-father and step-daughter which existed between defendant and Kinnie ceased. She was no longer his wife's daughter, within the meaning of the statute defining the crime of incest. A divorce between the defendant and his wife would likewise have put an end to his relation to Kinnie. *Compton v. State*, 13 Tex. Ct. App. 271; s. c., 44 Am. Rep. 703; *Noble v. State*, 22 Ohio St. 541; s. c., 1 Green Cr. Rep. 662. Relationship by affinity ceases with the dissolution of the marriage creating it. 1 Bish. Mar. & Div., § 314; 1 Bish. Cr. Proc., § 901.

If our view of the law be correct, and we are satisfied that it is, the defendant is not guilty of the crime of incest, and the court erred in so instructing the jury as to allow them to find him guilty, the evidence showing that, if he had carnal intercourse with Kinnie, it was not until after her relationship to him of step-daughter had ceased to exist. Under the facts of the case, he may be guilty of fornication and of adultery, and perhaps of rape, but not of incest.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

**DENVER, SOUTH PARK AND PACIFIC RAILROAD COMPANY V.
CONWAY.**

(8 Colo. 1.)

Negligence — storing explosives — corporation.

A railroad company, storing explosives in a depot building with a defective chimney flue, by reason whereof the building takes fire and there is an explosion injuring the plaintiff's neighboring property, is liable for the injury.

ACTION for injury by fire. The opinion states the case. The plaintiff had judgment.

Teller & Orahood, for appellant.

John W. Horner, for appellee.

BECK, C. J. The appeal is from a judgment rendered against the defendant below, the Denver, South Park and Pacific Railroad Company, for damages to the property and person of the plaintiff, occasioned by the burning of a depot building belonging to the defendant, and the explosion of a quantity of giant cartridges therein contained.

The complaint, as it remained after demurrer sustained thereto,
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contained three separate claims for damages alleged to have occurred to the plaintiff by reason of the negligence of the defendant.

It alleges that on the 14th day of August, 1880, the defendant owned and operated a railroad from Denver to and through the town of Red Hill, in Park county, Colorado. That it also owned and used a certain depot building in the latter place which contained a defective flue. That a pipe from a stove in said building passed into and through this flue, rendering the building extremely unsafe and liable at any time to take fire.

The complaint further alleges that the plaintiff owned a certain saloon building, together with the contents thereof, which was situated about thirty-five feet distant from the defendant's depot building; that the plaintiff also occupied, as proprietor thereof, a certain hotel building, situated about forty-five feet from said depot building.

The acts of negligence complained of are, that the defendant, knowing that the flue in said building was in a very defective condition, which rendered the building extremely unsafe, and liable at any time to take fire; and well knowing that the property of the plaintiff was in close proximity thereto, carelessly, negligently and wrongfully stored giant powder and explosive caps (the latter being used to explode the powder) in said building, and while said explosives were so stored therein, caused a fire to be made in the stove having the defective flue, by reason whereof the building was burned, resulting in an explosion which destroyed the plaintiff's property, and seriously injured him personally. Damages are claimed for the loss of saloon building and contents in the sum of \$1,038; for chattels destroyed in the hotel, in the sum of \$63, and for injuries to the plaintiff's person in the sum of \$5,000. Judgment is demanded for said several sums, together with interest thereon, from the 14th day of August, 1880 (the time of the fire), at the rate of ten per cent per annum.

The answer of the railroad company denies all the allegations of the complaint, including specific denials of the causes which led to the burning of the building and the disasters which followed.

The cause was tried to a jury, who returned a verdict for the plaintiff of \$2,250, upon which the court ordered judgment.

The errors assigned and relied upon relate to instructions of the court to the jury, and to the allowance of interest upon the value of the property destroyed. The first and second errors assigned

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are upon the first instruction. That portion of the instruction assigned for error is in the following words: * * * "That if they believe from the evidence that defendant had a depot building at Red Hill, at and prior to August 14, 1880, and stored therein prior to said August 14, 1880, and from thence until August 14, 1880, kept therein stored a large quantity of atlas powder, commonly known as giant cartridges; and that said depot building was near the property of the plaintiff, and during all the time said powder was therein, said depot building was in a defective condition and liable to take fire from a fire kept in a stove in said building, of which defendant had notice, and that by reason of the carelessness and negligence of defendant said building was burned, and the burning of said building caused said powder to explode, and by fire or otherwise, destroy the property of the plaintiff, they should find for the plaintiff."

[Omitting question of pleading.]

The testimony showed conclusively that the fire originated in the apartment of the building called the "office," that the ceiling over this room was composed of dressed boards of a single thickness, and that the pipe from the stove passed up through a hole in this board ceiling, and up through the roof. The only protection provided to prevent the pipe from coming in contact with the boards of the ceiling was a small sheet of tin or zinc, through which the pipe was passed, and which was placed on the upper surface of the ceiling boards. The same provision existed at the point where the pipe passed through the roof.

Upon looking into the evidence we learn that the depot building was a wooden structure, of the dimensions of about twenty-four feet by thirty-six feet, erected upon upright blocks of wood, which elevated the side nearest the railroad about eighteen inches above the ground, and the opposite side about three feet above the ground. The ends and sides of the building were composed of single boards placed upright against the frame timbers, the edges or cracks of the boards being battened with narrow strips of lumber. The roof was a steep gable, constructed of boards, which were battened like the ends and sides, and the exterior surface was covered with tarred paper, to protect the interior from snow and rain. The interior was divided into four rooms and a loft, the rooms being named respectively, "office," "waiting room," "warehouse" and "kitchen." These apartments, or some of them, including the office, were sep-

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arated from the loft by a board ceiling, which has already been described, as has also the aperture therein through which the pipe of the office stove passed.

As to the contents of the building on the night of the final conflagration, witnesses testified that there were about twenty cases of giant powder, or giant cartridges, in the freight room, weighing fifty pounds to the case; also a considerable quantity of coal oil in the immediate vicinity.

Testimony was introduced as to the explosive and dangerous nature of giant powder, and as to what agencies would cause it to explode.

The facts of the fire and explosion, the situation of the plaintiff and his property, and the effects produced by the disaster, were all proven.

The testimony further shows that on the night of the disaster a hot fire was made in the office stove in the presence of and with the knowledge of the defendant's station agent in charge of said station and building, who thereupon retired to bed in said office room. By reason of this fire and the so-called defective flue, the ceiling around the stovepipe was ignited, and fire communicated to the entire building causing its total destruction, the explosion of the powder and the damages to person and property sued for.

Portions of the second and third instructions are assigned for error as follows:

“Second. If they believe, from the evidence, that on and prior to the 14th of August, 1880, the defendant had a depot at Red Hill, near plaintiff's property, that was in a defective condition and liable to take fire from a fire kept therein, and that knowing the premises, a few days prior to said 14th day of August, 1880, defendant stored in said building a large quantity of atlas powder, commonly known as giant cartridges, and kept the same therein, and while it was stored therein said building took fire through a lack of the care and diligence above described on the part of the defendant, by and through its agents and employees, and caused said powder to explode and destroy by fire or otherwise the property of the plaintiff, they should find for plaintiff.”

“Third. And if the jury find, from the evidence, that the defendant stored and kept in the depot at Red Hill giant powder or cartridges, or other inflammable and combustible materials, when said depot building was defective and unsafe for the storage

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and keeping of such materials, and that defendant was aware of such facts, or that it did not keep the same with the vigilance and care, and in the charge of such careful and proper servants, as a prudent man would have done with the same kind of substances, and that by reason thereof the said depot building was burned, and the said giant powder and other substances exploded and destroyed the property of plaintiff by fire or otherwise, they should find for the plaintiff."

The objections assigned to these instructions are, that there was no evidence produced by the plaintiff that said depot building was defective and liable to take fire from a fire kept therein; nor any evidence that it was unsafe for the storage and keeping of such materials as therein described; nor any evidence that the defendant was aware of such facts; that there was no allegation in the complaint nor any evidence produced on that trial that said defendant did not keep said depot with vigilance and care, and in charge of such careful and proper servants as a prudent man would have done, and that by reason thereof the building was burned, the powder exploded and the plaintiff's property destroyed.

It is also assigned for error that the court instructed the jury that notice to defendant's agents was notice to the defendant, and that the acts of its agents and employees were the acts of the defendant.

The objections to these legal propositions are, that they are too broad, and consequently that they were calculated to mislead the jury; also that there was no evidence to support them.

The foregoing objections embrace the fourth, fifth, sixth, seventh, ninth and fifteenth assignments of error.

We will first consider the objections to the legal propositions contained in the foregoing instructions.

Respecting the acts and responsibilities of corporations, the law is, that artificial persons, like natural persons, are liable in damages for acts of negligence imputable to them, whereby injuries result to third persons. A corporation acts through its officers and employees, who, in the exercise of their respective functions, and to that extent, represent the corporation.

The rules and principles of law applicable to the relation of master and servant apply equally to corporations and their agents, and damages resulting from the negligence of both classes of persons is measured by the same rule.

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If a servant is guilty of a wrongful act when engaged in his master's business and while acting within the general scope of his authority, the master is liable although he did not authorize the particular act. It is no defense in such case that the servant disobeyed private instructions, or abused his authority. So a person who puts a servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is held responsible for damages resulting to third persons through the lack of judgment or discretion of the servant, while executing the trust, although he departed from the strict letter of his authority in the execution thereof.

The same rules obtained in respect to railroad companies. Accordingly it is laid down that the employees of such a corporation, both of the higher and the subordinate class, who are engaged in service at its stations, or on its trains, are presumed to be authorized by it to do such service, and to perform the acts usually incident to their positions; and it is liable for their tortious acts which are performed in the course of such service. *Rounds v. D., L. & W. R. Co.*, 64 N. Y. 129; s. c., 21 Am. Rep. 597; *Cohen v. Railroad Company*, 69 N. Y. 170; *Passenger R. Co. v. Donahue*, 70 Penn. St. 119; *Pierce Railroads*, 277.

Concerning the question of notice, the rule is the same in respect to corporations as to natural persons. As to the latter, the principle obtains that willful ignorance of a fact is equivalent to actual knowledge of the fact.

The rule is well settled that notice to an agent in transactions in which he is employed, where it becomes his duty, by virtue of his employment, to act on such notice, is notice to the principal. The term notice, in such instance, is synonymous with the term knowledge.

It may therefore be said that knowledge acquired by agents of corporations, in the discharge of official duties, of facts material to the transactions in which they are engaged, or coming within their respective departments of service, is the knowledge of the corporation. *Ewell's Evans Agents*, 229; *Angell & Ames Corp.* 305; *Abb. Dig. Corp.* 543, 544. An illustration of the rule that notice to the agent in the transactions in which he is employed, and within the scope of the authority confided to him, is notice to the principal, is found in the case of a locomotive engineer, wherein it is held that if the fact be known to him, that either the road or the machinery is defective, it is knowledge on the part of the company,

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and renders it responsible for the consequences. *N. & C. R. Co. v. Elliott*, 1 Cold. 611.

It will be observed that the rules above stated concerning the responsibilities of corporations growing out of the acts of their agents, are more full and guarded upon these subjects than the legal propositions of the instructions upon the same subjects.

The testimony showed that the special attention of the defendant's agents was called to the condition of this flue, or stovepipe passage, before the storing of the explosive materials in the building. It was a notice to the defendant's agent, and through him to the defendant itself, not only of the condition of the flue, but of the degree of heat generated by the stovepipe, and the danger, great or small, of a fire originating at this point.

This agent being in charge of the company's property and business at this station, the rule applies that knowledge acquired by agents of corporations of facts coming within their respective departments of service is the knowledge of the corporation.

On the question of notice, it further appeared that officers of the company, whose special duty it was to inspect this building, and to see that necessary flues were provided and put in, neglected that duty. The agent in charge of the building knew from a personal inspection, and from the warning of a previous fire, that the so-called flue was defective and dangerous. Within the principles announced, then all these agents were chargeable with knowledge of the dangerous condition of the building. This knowledge being acquired within the course of their several employments, it was their duty to communicate it to the company, and in law the knowledge of these agents was the knowledge of the company. In the language of the instructions, notice to these agents was notice to the company.

Lastly, under the rules of law before stated, the shipping of the giant cartridges to this depot, the depositing of them in the building, and the making of the fire in the office stove, were each and all of them acts of the defendant.

These and the failure to provide a sufficient flue, being the acts complained of, and it being shown that they were all committed by agents of the company in the course of their employment, and within the scope of the authority confided to them, the court properly said of them in its instructions, "the acts of its agents and employees were the acts of the defendant."

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The question whether the acts complained of constituted negligence was a question for the jury to decide, and was so left. We think their finding was fully warranted.

[Omitting minor points. On a question of interest the judgment was] *Reversed.*

SANDERSON V. FRAZIER.

(8 Colo. 72.)

Carrier — stage-coach — negligence — evidence.

In case of injury to a passenger by the overturning of a stage-coach, *held*, (1) that the passenger was not necessarily negligent in having his arm outside the window;* (2) that the overturning is *prima facie* proof of the owner's negligence;† (3) that evidence of the driver's want of skill before and after the accident is competent.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Hugh Butler, for plaintiff in error.

Wells, Smith and Macon, for defendant in error.

STONE, J. The law governing the liability of stage-coach proprietors as common carriers of passengers is quite well settled by juridical decisions of the highest courts.

The law imposes upon such carriers the duty of providing road-worthy vehicles suitable for the transportation of passengers, steady and manageable horses, with strong and proper harness, and careful drivers of reasonable skill and good habits. Although their undertaking is not one absolutely to convey safely — that is to say, while they do not warrant the safety of passengers at all events, yet their undertaking and liability go to this extent, that their means of transportation are suitable and sufficient, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty.

Respecting the measure of this care and diligence, considering

* See *Dahlberg v. Minn. St. Ry. Co.* (82 Minn. 404), 50 Am. Rep. 585.

† See note, 50 Am. Rep. 558.

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that such carriage is charged with the lives, limbs and health of human beings, it has been held that passenger carriers bind themselves to carry safely those whom they take into their coaches, "as far as human care and foresight will go — that is, for the utmost care and diligence of very cautious persons." Some cases even hold that such carriers are responsible "for any, even the slightest neglect." This doctrine is laid down by the Supreme Court of the United States, in the case of *Stokes v. Saltonstall*, 13 Pet. 190, which is regarded by the authorities as the leading case on this subject in the United States, and the same doctrine is stated as the law by Mr. Story in the text of his work on Bailments, section 601. In support of the same rule as to liability in such cases are the following authorities: *Farish v. Reigle*, 11 Gratt. 697; s. c., 62 Am. Dec. 666; *McLean v. Burbank*, 11 Minn. 277; *Maury v. Talmadge*, 2 McLean, 157; *Peck v. Neil*, 3 McLean, 23.

On the other hand, it is the duty of passengers to comply with the reasonable regulations of the carrier, and to exercise proper care and diligence in avoiding injury to themselves, for the rule that one cannot recover for an injury which has been caused by his own negligence, or where by his own fault he has so far contributed thereto that but for such fault on his part the injury would not have happened, is applicable to this class of passengers.

The appellee Frazier was a passenger in one of the stage-coaches of appellants, running at that time between Canon city and Leadville, and by the upsetting of the vehicle his arm was broken, and the alleged negligence of the driver in causing the upset is the ground of action for the resultant injury. A question of contributory negligence on the part of the appellee was made by the pleadings in the court below, and one of the alleged errors relied upon by appellants in seeking to reverse the judgment is, that the verdict is contrary to the evidence and the law in respect to such alleged contributory negligence.

The act of appellee constituting the negligence complained of was in having his arm, at the time of the accident, "outside the coach."

The upset was caused by the wheel on one side of the vehicle striking on a rock at one side of the road, whereby the stage was thrown over upon the opposite side. This portion of the road was in a canon in a mountainous part of the journey. It was in the night; there was no light on that side of the stage which struck

the rock. But the driver testified that it was not so dark but that he was able to see the rock just before striking it. The appellee was sitting on the end of the seat on the opposite side; there were two other passengers in the same seat which crowded appellee close to the side; he had his arm either resting on the rail, or projecting outside the body of the stage, so that when overturned the other passengers in the same seat were thrown down upon him; his arm was caught under some portion of the vehicle and broken, and he was unable to be extricated until the other passengers had got out and lifted up the stage. Upon this state of facts it is contended by counsel for appellants that appellee was chargeable with such contributory negligence as ought to bar a recovery. In support of this contention, the case of *P. & C. R. Co. v. McClurg*, 56 Penn. St. 294, is cited, where a passenger by reason of the protrusion of his arm from the window of the car in which he was riding, was injured by the arm coming in contact with another car standing on a switch, and the court held, and as we think, correctly, that where such passenger "puts his elbow or arm out of the window voluntarily, without any qualifying circumstances impelling him to do it, it is negligence *in se*, and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law."

There is a wide difference however between such a case and the one before us. Railway coaches pass along an undeviating track and often within a few inches of a signal post, switch bars, cattle-guards, bridge timbers and cars upon side tracks, rendering it dangerous for passengers to expose any portion of the body beyond the outer line of the coaches, which themselves project beyond the wheels and the track. But stage-coaches do not in this particular differ from other road vehicles, the wheels of which project laterally beyond the body of the vehicle, which circumstance, in connection with the different character of the roadway and mode of transportation, is an immunity against danger from the mere projection of an arm outside the window or beyond the line of the body of such vehicle. In the case of an injury like that in the railway case cited, the projection of the arm outside the window is the cause of the resultant injury. In the case of the overturning of the stage of appellants by running upon a rock, the position of the appellee's arm was no more a cause of the upset which produced the injury than the position of the arms of the other passengers or of the hat upon his head. Besides, the evidence in the record shows that the

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vehicle in question was not a regular or ordinary stage-coach with windows, but a Concord mail wagon or canvas back known as a "Jerky," without windows, but having a canvas cover with canvas side curtains, supported by wooden standards at the sides and bows overhead. The appellee, crowded as he was against the side, with three passengers on the seat, would naturally, and we may say unavoidably, thrust out his arm when the vehicle was overturned, falling as he did, beneath the weight of the other passengers, and with no wall or coach body to protect him. The curtains even were rolled up at the time. Under the circumstances the injury to appellee was an almost inevitable result of the overturning of the vehicle; and the fact that his arm was at the time outside the rail or outer edge of the wagon bed cannot be imputed as negligence or want of due care on his part as passenger.

Another ground of error is that the court permitted evidence that one of the lamps of the stage — the one on the side which collided with the rock — was not lighted at the time of the accident. There was no error in this. It was a circumstance which, in connection with all the others, tended to show negligence on the part of appellants. The driver testified that it was a starlight night and he was able to see the road track, the wheel and the rock just before he struck it, and that the light would not have assisted him. But this testimony does not render improper the evidence previously admitted in making the case for appellee, showing, at least *prima facie*, a want of due care. In the case of *Crofts v. Waterhouse*, 3 Bing. 321, BEST, C. J., says: "The coachman must have competent skill and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." This is certainly strong language, but does not appear to be against the weight of authority in stating the general rules governing in such cases.

Counsel for appellants contend for the rule that the burden of proof is on the plaintiff in such cases not only to show negligence on the part of defendant, but ordinary care on his own part. An examination of the cases will clearly show that a different rule is established by the great weight of authority. Mr. Story lays down

the rule as follows: "Where any damage or injury happens to the passenger by the breaking down or overturning of the coach, or by any other accident occurring on the road, the presumption *prima facie* is, that it occurred by the negligence of the coachman, and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatever; and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. Story on Bailments, § 601a. Our own court in the case of *Wall v. Livezey*, 6 Colo. 465, declared the rule in the following language, used by Chief Justice BECK: "A *prima facie* case however is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger, and that it was occasioned by the failure of some portion of the machinery, appliances or means provided for the transportation of the passengers. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further and show the particular defect or cause of the accident, until the presumption is rebutted. It devolves upon the carrier to rebut this presumption by evidence that he exercised the greatest degree of diligence practicable under the circumstances." In the case of *Stokes v. Saltonstall*, *supra*, it is held by the Supreme Court of the United States that in such action the facts that the coach was upset and the plaintiff injured are sufficient *prima facie* evidence of negligence or want of skill of the driver, and shift the burden of proof upon the defendant to show that the driver was in every respect qualified, and acted with reasonable skill and the utmost caution; and if the disaster was occasioned by the least want of due skill or of prudence on his part, the defendant was answerable. The same rule substantially is held to be the law in the cases of *Farish v. Reigle*, and *McLean v. Burbank*, hereinbefore cited. Upon the question of negligence on the part of appellants, the evidence shows that at a station, where the stage stopped before the accident, the driver discovered that there were no lanterns on the stage; that he called for two lamps; that the superintendent brought two, and put on, but that one was out of repair, and so was not lighted; that at the place of the accident the road was level and slightly up-grade; that the rock was a foot and a half or two feet outside the track of the roadway; that there was a gully on the opposite side, the distance being about twelve or thirteen feet be-

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tween the rock on one side, and the gully on the other, and the width of the vehicle between the outside of the hubs about seven feet; that the driver knew the place well, because the gully had been made by a washout, and that he slackened his speed at that point.

Under these facts, the question was properly submitted to the jury by instructions, whether the accident might not have been avoided by the exercise of due care on the part of the agents of appellants; or in other words, whether the injury to appellee was not caused by the negligence of appellants in not using the means clearly within their power and control to have prevented the upset.

Some testimony was admitted, over the objection of appellants, touching the manner and character of the driving of the stage before and after the accident in question. We do not think this was unwarranted. It related to the driver's knowledge of the road and his skill in his employment, and for this purpose was not impertinent, although incompetent to prove his conduct in this particular instance in producing the accident. The want of skill of the driver may be shown, at the time of the accident or at any prior time; but his good or bad conduct can only be looked at at the time the accident occurred, or as connected with the accident. *Peck v. Neil*, 3 McLean, 24. And evidence that some distance further on the road, the same night, the driver got outside the road and into a gully made by a recent washout, and that the passengers had to get out and assist in extricating the stage and team, and getting them back on the road, was admissible for the purpose of showing the degree of darkness of the night, the character and condition of the road, and the consequent necessity for proper lights on the vehicle. We have examined with care the instructions given by the court, and those refused upon which errors are assigned, and guided by the rules and principles of law herein laid down as applicable to the facts of the case, we cannot find that the errors contended for are well assigned.

[Omitting a question of damages.]

Affirmed.

HUFFSMITH V. PEOPLE.

(8 Colo. 175.)

Criminal law — same act punishable under general law and ordinances.

A general statute prohibited keeping open tippling houses on Sunday. Subsequently a city charter gave the city "exclusive power to license, tax, restrain, prohibit and suppress tippling houses" in the city. The city enacted an ordinance prohibiting the keeping open of any place for the sale of intoxicating liquors "between midnight and 5 o'clock, A. M., of the day following." The defendant was convicted under the statute of keeping open a tippling house on Sunday in that city. *Held*, error.

CONVICTION of keeping open a tippling house on Sunday.
The opinion states the case.

Lucius P. Marsh, for plaintiff in error.

D. F. Urmey, attorney-general, for defendant in error.

BECK, C. J. The defendant, Huffsmith, was indicted for keeping open a tippling house on the Sabbath day within the county of Arapahoe, contrary to the provisions of the State statute, which provides, among other things, that if any person * * * shall keep open any tippling or gaming house on the Sabbath day or night, * * * every such person shall on conviction be fined not exceeding \$100, or imprisoned in the county jail not exceeding six months." Gen. Stats. 331, § 151.

The defense relied upon was, that the alleged offense was committed within the corporate limits of the city of Denver, in said Arapahoe county, and that the legislature, by an act approved February 13, 1883, entitled "An act to reduce the law incorporating the city of Denver and the several acts amendatory thereof into one act and revise and amend the same," had vested in said city exclusive jurisdiction over the whole subject pertaining to the supposed offense, for which reason the defendant was not liable to indictment and punishment under the State statute.

Defendant offered to prove, that in pursuance of the power granted, the city had assumed jurisdiction over the entire subject by the adoption of an ordinance embracing the same, and that he had complied with the provisions thereof, which proof was re-

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jected upon the trial, and the defendant convicted under said indictment.

Exceptions were duly reserved to the rulings and judgment of the court, and the same are assigned for error.

It will only be necessary to consider the question of jurisdiction, as that question, in our judgment, is decisive of the case.

Section 17 of the amended charter of the city of Denver confers power over a variety of subjects upon the city council, to be exercised "by ordinance not repugnant to the Constitution of the United States or the Constitution of the State of Colorado." Clause fifteenth of this section is as follows: "The city council shall have exclusive power within the city to license, tax, restrain, prohibit and suppress tippling houses, dram shops and the selling or giving away of any intoxicating or malt liquors by any person within the city, except by persons duly licensed."

This act authorized the city council to make such regulations concerning tippling houses within the city limits, and to impose such restraints upon the keepers thereof, as it might deem expedient for the public peace and welfare; provided, the same were not repugnant to the Constitution of the United States or the Constitution of the State of Colorado.

Defendant offered in evidence an ordinance of the city, passed in pursuance of the powers granted, and which was in force at the time of the commission of the alleged offenses, which provides that licenses shall be given to persons to transact business of various kinds, including the vending of spirituous, vinous and malt liquors. Fees for licenses are prescribed and penalties provided for violations of the ordinance. He also offered in evidence a license granted to him under the provisions of said ordinance.

Section 11 of this ordinance provides as follows: "That hereafter it shall be unlawful to keep open any place where spirituous, vinous, malt or intoxicating liquors are sold or given away under a city license, or to sell or give away, either in person or by agent or servant, any such spirituous, vinous, intoxicating, or malt liquors, between the hours of 12 o'clock midnight and 5 o'clock A. M. of the day following."

This proof, if admitted, would have shown that the city had accepted and exercised the powers granted by the statute. By the ordinance referred to, it had restrained and prohibited the defendant and others from keeping open their tippling houses during a

portion of every day in the week; that the restriction as to keeping open on the Sabbath was not as broad as that contained in the general law was not owing to any lack of power in the city.

The city council might have imposed, or may yet impose, precisely the same restriction enjoined by the general statute, and prohibit the keeping open of tippling houses on the Sabbath day.

If then the city government has power to adopt and enforce such an ordinance, and if a prosecution may also be sustained under the general law, the consequence is that the same person may be subjected to two distinct prosecutions and to be twice punished for the same offense, which is contrary to the fundamental principles of justice.

There are instances where the same act is held to be an offense against the laws of separate jurisdictions, and punishable by both, as example, against the laws of the United States, and also against the laws of a State, and according to the authorities, the same act may, under certain circumstances, constitute a penal offense under the laws of a State and under the by-laws of a municipality as well. But in such cases the one act is held to constitute two distinct offenses, neither of which is included in the other. That however cannot be said where one of the jurisdictions is exclusive as to the whole subject-matter of the offense.

In the present case it seems impossible that a concurrent jurisdiction to restrain tippling houses can exist in the State, and in the city as well. The same statute which confers upon the city exclusive control over such houses divests the State of its control over them. *Hetzer v. People*, 4 Colo. 45.

As suggested in argument, it does not appear that any question of public morals or sanctity of the Sabbath day is directly involved in this case, for the general statute, under which this conviction was secured, does not forbid the exercise of any other vocation or business on that day. It cannot therefore be said that this prosecution proceeds upon a different hypothesis from a like prosecution under an ordinance of the city upon the same subject.

From the foregoing considerations it follows that the amended charter of the city of Denver, and the ordinances passed thereunder, afford to the defendant a protection against this prosecution. The grant of exclusive power and authority to one jurisdiction, to restrain, regulate or prohibit a business as to every day in the week, is irreconcilable with the existence of a concurrent power to pro-

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hibit the exercise of the same vocation upon a single day in the week.

To this extent the act approved February 13, 1883, repealed the general law, by necessary implication. *Bennett v. People*, 30 Ill. 389; *Siebold v. People*, 86 Ill. 33; *State v. Clark*, 54 Mo. 17; *State v. De Bar*, 58 Mo. 395.

The judgment is reversed.

Judgment reversed.

CARLISLE v. PULLMAN PALACE CAR COMPANY.

(8 Colo. 330.)

Taxation — of railway cars of non-residents.

Sleeping cars, hired and run by a railway company in Colorado, from a company in Illinois having no office or place of business in Colorado, are taxable in the latter State.

ACTION for taxes. The opinion states the case. The plaintiff had judgment below.

G. Q. Richmond and Bailey & Wilkin, for plaintiff in error.

Markham, Patterson and Thomas, for defendant in error.

BECK, C. J. This action was instituted in the District Court of Pueblo county against the defendant in error, for the recovery of money alleged to be due the county on account of taxes assessed by the county authorities, against the defendant in error, upon certain sleeping cars used upon the passenger trains of the Denver and Rio Grande, and the Atchison, Topeka and Santa Fe railroads. The court below decided against the authority of the county to levy the taxes, and this writ of error is prosecuted in behalf of the county to test the correctness of the decision.

The cause has been submitted upon an agreed statement of facts which discloses among other facts that similar controversies exist in other counties, and that the final decision in this case is to operate as a determination of them also.

We learn from the stipulation that Pullman's Palace Car Company, the defendant in error, is a non-resident manufacturing com-

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pany, organized and doing business under the laws of the State of Illinois, where its home office is located. A portion of the business of defendant in error is the building of sleeping cars, and hiring them out to railway corporations throughout the country, to be by them operated upon their lines of railroad, for the joint profit of both contracting parties. These contracts, all of which are similar, are to the effect that the Pullman company will furnish to a railroad company, for a term of fifteen years, a sufficient number of sleeping cars to meet the requirements of travel over all lines of railway owned or operated by the railroad company. The cars are to be hauled by the railroad company over the various lines of the road now or hereafter to be owned or controlled by said company, and employed in the transportation of travellers for its profit, in such manner as in the judgment of the general manager or superintendent of the railroad may be best to accommodate passengers. The railroad company is to keep the cars in good running order and repair and to bear certain running expenses, including light, fuel, lubricating material and ice; also to bear the expenses of all repairs rendered necessary by accident or casualty. The Pullman company is to provide the cars, keep the carpets, upholstery and bedding in good and cleanly condition; furnish necessary employees to preserve order in the cars; collect berth and couch fares, and take proper charge and care of the inside of the cars; in consideration whereof, the Pullman company is to be entitled to collect from persons occupying the berths and receiving special accommodations in said cars, such sums of money as may be usual on other lines furnishing equal accommodations. It is to have the right to place for sale in such of the ticket offices of the railroad company as it may desire, tickets for berths, couches, etc.; such tickets to be sold by the agents of the railroad company, without charge to the Pullman company.

The contract contains an option to the railroad company to provide three-fourths, or less of the capital required for furnishing the equipments of said cars, at any time within five years from the date of the contract, and thereupon to become a joint owner with the Pullman company in such equipment, and to receive a proportional amount of the gains, and bear a like proportion of the losses accruing to and sustained by the latter company. Another option given the railroad company is, that it may terminate the contract itself in five, eight or eleven years, by purchasing the sleeping cars and equip-

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ments, at their actual cash value. There are other provisions and stipulations, but we deem the foregoing sufficient to show the relation existing between the contracting parties.

The sleeping cars, furnished under the contract mentioned in the complaint, passed daily into and through the county of Pueblo. Those operated in connection with the rolling stock of the Denver & Rio Grande railway were hauled from Denver south to Pueblo, and from that point by different branches or extensions to Leadville, Durango and Antonito, passing through several counties in a single day, all said points being within this State. Those operated on the trains of the Atchison, Topeka & Santa Fe railway pass daily through the county of Bent, and daily enter into and depart from the county of Pueblo. These trains pass over a continuous line of railway, extending from Kansas City, in the State of Missouri, through the State of Kansas, to the terminal point of said railroad in this State, Pueblo. The latter is also one of the terminal points of the Denver & Rio Grande railway. The Pullman company however appears to have no principal place of business within this State.

The transcript does not disclose the fact whether the Pullman Company has filed in the office of the secretary of State a copy of its charter of incorporation, in compliance with the requirements of our statute, or not, but it does appear that no provision is made in its contract with the railroad companies for payment of State and county taxes upon said cars.

It further appears that said sleeping cars were operated under said contracts, on the lines of the Atchison, Topeka & Santa Fe railroads during the years from 1876 to 1881, inclusive; and upon the Denver & Rio Grande railroad during the years 1880 and 1881. It further appears that during all said years no return was made or statement furnished to the State board of equalization, either by the railroad companies or by the Pullman company, of the number and value of said sleeping cars, as required by the revenue laws of the State; also that no assessment was made thereof by said board for the years aforesaid. The property having been omitted from taxation, the revenue officials of Pueblo county assessed and taxed the same for the years aforesaid, and are now seeking by this proceeding to collect such taxes from the defendant in error.

The important points properly presented for decision upon this record are, whether property of this character, and so circumstanced,

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is subject to taxation under our statutes, and if it is, whether the authority to make the assessment exists in the county officials under any circumstances, or solely in the State board of equalization.

The principal points urged in favor of the affirmance of the judgment are, that the Pullman company cannot be held liable for these taxes, for having neither home office nor a principal place of business within the State, the property has no *situs* for taxation; but that if the property is subject to taxation at all, it can only be legally assessed against the railroad companies who control it under their contracts.

The Constitution of this State, and the laws passed in pursuance thereof, subject all property, real and personal, within the State to taxation that shall not be expressly exempted by law. The property assessed by the officials of Pueblo county was personal property within the State, and it was not exempt by law. Law writers say, in reference to personal property, that it matters not whether the owner be a private person or a corporation — a resident or a non-resident, or whether the property be permanently located within the State, or be merely employed therein, it is subject to taxation. The conceded principles governing this subject are, that justice demands that all property in the State, not exempt by law, shall be subject to taxation; that no person or class of persons, whether natural or artificial, shall escape the burdens of supporting the government, and that corporations shall have no greater exemptions in the matter of taxation than are extended to every citizen of the State.

Articles of commerce in transition are exempt; but no such articles or question is involved in this case. The nature or character of the articles involved in the present controversy, and the purposes for which they were employed by both contracting parties, bring them within that class of property mentioned in our statute as railroad equipment and rolling stock.

But it appears from the stipulation of facts that the real owner of this property is a non-resident corporation, and it does not appear that the owner has a home office or principal place of business within the State. It affirmatively appears that the property is in a constant state of transition, passing from point to point through the State, and some of it, as before stated, passing beyond the limits of the State. Under such circumstances, it has no more

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local existence in one county than in another of those through which it passes.

Transitory personal property must have a *situs* for taxation, or it is not subject to any jurisdiction. To hold otherwise would be to subject such property to the jurisdiction of every county wherein it chanced to be on the annual assessment day; and the law is well settled that no class of property can be subjected to such burden. This would be carrying the power of taxation to the extent of destruction, an abuse not even to be presumed. *Ogilvie v. Crawford Co.*, 2 McCrary, 148; *Carrier v. Gordon*, 21 Ohio St. 605; *Hoyt v. Commissioners*, 23 N. Y. 224.

The law is that the residence or principal place of business in the State of the owner, agent or other person legally interested in movable property is the *situs* of such property for the purpose of assessment and taxation, although it is liable to be in several different counties every day. See authorities *supra*; *State v. Severance*, 55 Mo. 379-388; *Walton v. Westwood*, 73 Ill. 125.

In view of these principles and the facts set out in the agreed statement, no difficulty is met in determining the *situs* of the property under consideration. The railroad companies have possession and control of the property, under contracts to continue, at their option, for a long term of years, and during which term they use these cars for the same purposes as they use their first-class passenger cars, and probably realize as much profit therefrom. This possession, control and community of interest which the railway companies have and exercise gives the sleeping cars the same *situs* under the statute applicable to this class of property as articles of the same class owned by the railroad corporations.

[Question of jurisdiction as between State and county authorities omitted.]

Judgment affirmed.

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(8 Colo. 489.)

Constitutional law — prosecution by information.

A statute requiring all criminal prosecutions to be commenced by information is inconsistent with the constitutional provision that "until otherwise provided by law" they shall be commenced by indictment.

HABEAS CORPUS. The opinion states the case.

Gen. H. Kohn and S. E. Browne, for petitioner.

T. H. Thomas, attorney-general for people.

BECK, C. J. The petitioner charges, in his petition for the writ of *habeas corpus*, that he is illegally deprived and restrained of his liberty by confinement at hard labor in the State penitentiary, under a judgment of the Criminal Court of Arapahoe county, rendered against him upon a conviction for grand larceny.

The illegality charged is that he was not proceeded against criminally for said offense upon the presentment or indictment of the grand jury, but upon an information filed by the district attorney of the second judicial district. He alleges that the matter complained of renders his trial and conviction void.

The petition questions the constitutionality of section 23 of the act of the legislature approved February 7, 1883, entitled "An act to provide for the organization and maintenance of criminal courts; to prescribe the jurisdiction, powers, proceedings and practice of said courts, and to define the duties and qualifications of the judges and other officers connected therewith, and to repeal * * * all other acts and parts of acts inconsistent with this act."

This act provides that criminal courts shall be courts of record, and shall have concurrent jurisdiction with the District Courts of the same counties in all criminal cases not capital, and such appellate jurisdiction as may be provided by law.

It is further provided that they shall be governed by the practice and proceedings which are now, or may hereafter be, prescribed by law for District Courts in criminal cases, so far as the same can be made applicable and are not inconsistent with the provisions of this act.

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The district attorney of the judicial district in which any criminal court is established is made prosecuting attorney of the criminal court, and power is conferred upon the judge of said court to appoint a special district attorney, when necessary, to perform the service of the district attorney.

The portion of the act complained of as obnoxious to the State and Federal Constitutions is section 23, which dispenses with the grand jury and provides for the prosecution of offenses in said court, upon informations filed by the district or prosecuting attorney. Section 23 is as follows: "No grand jury shall be summoned or impanelled in any criminal court, but the prosecution of all offenses, whether denominated felonies or misdemeanors when originally commenced or instituted in such court, shall be by information presented to and filed in said court; such information shall be signed, verified and presented by said district attorney appointed by the court, as provided by this act."

The balance of the section prescribes the manner in which informations shall be verified, and that the verification shall not be taken on the trial as evidence of the truth of the information; also that the verification shall not be read by nor submitted to the jury trying the case.

The statutory punishment for the offense of which petitioner was convicted, grand larceny, is confinement in the penitentiary for a term not less than one nor more than ten years. The petitioner was therefore convicted of a felony, as the term is defined by section 4, article 18, of the Constitution, which is: "The term 'felony,' wherever it may occur in this Constitution or by the laws of this State, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary and none other."

The offense for which he was convicted came also within the list of infamous crimes as defined by statute. Gen. Stats., § 944. After the filing of the information against the petitioner in the Criminal Court, he moved said court to quash the same, upon the grounds that it charged an infamous crime, which could only be prosecuted upon a presentment or indictment of a grand jury; that the statute providing for the filing of informations by the district attorney was unconstitutional and void; that the law for the punishment of crime is general in its nature and must have a uniform application to the entire State; and because the prosecution upon information for such crimes is contrary to the Constitution of the

United States. This motion was denied, to which ruling of the court the petitioner duly excepted.

Counsel for the petitioner cite several sections of the State Constitution which they claim have been violated by the enactment of the statutory provisions complained of, among which are the following:

Article 2, section 8. "That until otherwise provided by law no person shall for a felony be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases offenses shall be prosecuted criminally by indictment or information."

Article 2, section 23. "The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases, in courts not of record, may consist of less than twelve men as may be prescribed by law. Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment; provided the general assembly may change, regulate or abolish the grand jury system."

The attorney-general who appears for the State is of opinion that the proceedings had in the Criminal Court are valid, and that the statute authorizing prosecutions upon information of a district attorney is constitutional.

He contends that the entire grand jury system is nothing else than a rule of practice or mode of proceeding, and quotes section 28 of article 6 of the Constitution to show that rules of practice are only required to be uniform in courts of the same class or grade. The section quoted is as follows:

"All laws relating to courts shall be general and of uniform operation throughout the State, and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally shall be uniform."

He calls attention to the fact that the act of the general assembly in question provides for the organization of Criminal Courts, prescribes a uniform system of proceeding and practice for such courts throughout the State, and generally conforms to the constitutional requirements above mentioned.

Relying upon the soundness of the foregoing proposition, the

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attorney-general concludes that no conflict exists between the Criminal Court act of February 7, 1883, and said sections 2 and 23 of article 2 of the Constitution.

As to said section 2, "that until otherwise provided by law, no person shall for a felony be proceeded against criminally otherwise than by indictment," he points to the above-mentioned act of the general assembly, and says it has been "otherwise provided by law," as required by the above sections.

It is also strongly urged in the argument that section 23 of article 2, and section 28 of article 6 of the Constitution, afford ample authority for abolishing the grand jury system as to the Criminal Courts, leaving it in force as to the District Courts.

We are of opinion that counsel for the State has fallen into two grave errors: 1. In assuming that all constitutional requirements are satisfied when the procedure or practice is made uniform in courts of the same class or grade, in accordance with the provisions of section 28 of article 6. 2. That this system may be abolished as to one class of courts having jurisdiction of felonies not capital, to-wit, Criminal Courts, and that it may remain in force in another class of courts having general jurisdiction of all felonies throughout the State, viz.: District Courts.

The above-mentioned propositions do not seem to reach the merits of the objections raised by the petition and record as to the unconstitutionality of that part of the act of 1883, which provides that "no grand jury shall be summoned or impanelled in any Criminal Court," etc.

It is true that section 28 of article 6 of the Constitution requires the practice and proceedings of all courts of the same class or grade to be uniform. It is also true that the three Criminal Courts now existing in the State for the respective counties of Arapahoe, Pueblo and Lake are the only courts now existing of that class or grade. But it does not follow that an act of the general assembly, assuming in its title to provide for the organization of these courts and to prescribe the jurisdiction, powers, proceedings and practice thereof, can abolish as to this class of courts alone, and as to the citizens in the particular sections of the State over whom they may exercise jurisdiction, the grand jury system. This institution has come down to us from Magna Charta, and has ever been regarded by the masses as a protection against arbitrary and malicious prosecutions.

When the legislature undertakes to abolish as to a portion of the State rights and privileges guaranteed by both the State and Federal Constitutions to the whole people of the State, until stricken out of the fundamental law, it should look beyond a particular provision of the Constitution intended only to regulate the practice and proceedings of the different classes of courts, so that the same should be uniform in those of the same class or grade.

Such uniformity was never intended to be attained by ignoring or abolishing the fundamental rights of any portion of the people. The legislature may prescribe the practice and proceedings of the courts, but such power must be exerted within constitutional limitations and restrictions.

The grounds assigned by the petitioner in his application for the writ of *habeas corpus*, and the grounds upon which his motion to quash the information filed against him in the Criminal Court were based, raise highly important questions of constitutional law.

The right of a State to abolish the grand jury system as to all its inhabitants is not necessarily involved. That a State may abolish this system, and adopt that by information, without violating the restrictive provisions of the fourteenth amendment to the Constitution of the United States, is settled by the case of *Hurtado v. California*, 110 U. S. 516.

Nor is the constitutionality of the Criminal Courts questioned in this proceeding. That portion of the act providing for their organization, etc., which attempts to abolish the grand jury system and to substitute that by informations, as to such courts, may be held invalid and the remainder of the act may be sustained. *Cooley* Const. Lim. 178; *People v. Rucker*, 5 Colo. 455.

The essential question presented for our consideration is, has the general assembly the power, under the restrictions of the Federal and State Constitutions, to abolish the grand jury system as to the Criminal Courts only, and to substitute as to them the system of prosecuting felonies by information, leaving the grand jury system in full force and effect as to the District Courts throughout the State?

The Criminal Courts are courts of record; their judgments are final, and writs of error from the Supreme Court lie thereto in the same manner as to judgments of the District Courts. But the proposition of petitioner's counsel that the Criminal Courts are of the same class or grade as the District Courts, within the meaning of the Constitution, is untenable. That instrument, in providing

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for the organization and jurisdiction of courts, made specific provision for the creation of Criminal Courts, to have criminal jurisdiction, and that limited to crimes not capital. But in the creation of District Courts they were given general jurisdiction, both as to criminal and civil matters.

The fact that the jurisdiction of both courts was made concurrent in criminal cases not capital does not make them courts of the same class or grade. They were not thus created, and the jurisdiction of one is essentially different from that of the other.

Let us now consider the effect of the act of 1883 upon the criminal jurisprudence of this State in respect to its constitutionality. In all but three counties of the State no person can, for a felony, be prosecuted otherwise than upon an indictment of a grand jury. In said three counties this right of an investigation of the charge by a grand jury is only recognized in prosecutions instituted in the District Courts, while prosecutions originally instituted in the Criminal Courts, in the same grade of criminal offenses, are prosecuted upon informations of the district attorney. If the provisions of the State Constitution, that until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment, and if the power conferred upon the general assembly to provide otherwise is that granted by section 23 of article 2, as we think it is, viz., "provided the general assembly may change, regulate or abolish the grand jury system," then the question arises, how must this power be exercised?

Clearly, if the object of the grand jury system is to guard certain fundamental rights of every citizen of the State, it follows, according to elementary principles of construction, that the change, regulation or abolition of the system must be so made as to equally affect the whole community in respect to the same rights and immunities, under the same or similar circumstances.

It cannot reasonably be contended that such is the effect produced by the act of February 7, 1883. The effect of such legislation to the citizen is, if he be charged with the commission of a felony of infamous crime not capital, within the jurisdiction of a Criminal Court, an information may be filed against him therein, upon the oath of a single informer, and he may be put upon his trial therefor; whereas if charged with the commission of the same offense outside of such jurisdiction, or if proceedings be instituted against him within such jurisdiction, but in a District

Court instead of a Criminal Court, he would be accorded the right and privilege of having the truth of the charge investigated by a grand jury composed of his peers, before he could be put to the expense, inconvenience or disgrace of a public trial. It may be an open question whether the proceeding by indictment secures to the accused any superior rights and privileges over that by information, but such fact does not alter the constitutional question here presented.

The delegates of the people in framing the Constitution provided the grand jury system for the prosecution of infamous crimes, and prohibited their prosecution in any other manner until that system should be abolished. This circumstance, and the further fact that the people ratified the instrument, affords strong evidence that the people then favored this time-honored institution as that best suited to afford equal protection of the laws to all citizens.

It is a well-known fact, and appears in the reports of the proceedings of the constitutional convention, that the delegates were divided in opinion as to whether the grand jury system should be retained or not; but upon a final vote, after the subject had been debated, the vote was largely in favor of retaining that system, subject to the power of the legislature to change, regulate or abolish it. After the work of the convention had been completed, a committee of that body was appointed to prepare an address to the people, informing them of the main features of the instrument framed for their "adoption or rejection." Concerning the grand jury, the address stated, under the title "bill of rights," as follows: "The grand jury system has been so modified as to make a grand jury consist of twelve men instead of twenty-three — any nine of whom concurring may find a bill; and the question whether it may not be abolished altogether is left to the legislature."

This portion of said address to the people, coupled with the language of the instrument itself, shows the understanding of the framers of the Constitution, and inferentially, the understanding of the people, that it was the expression of their will, at the time, that the grand jury should be retained, subject to the power of the general assembly to change, regulate or abolish it. But the people conferred on that body no power to abolish the institution as to one man, leaving it in force as to another; no power to abolish it as to one county, and not as to all counties; and certainly no power to enact a law which would, to any extent, leave it to the discretion

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of district attorneys or examining magistrates whether an individual should have the advantage of an investigation by a grand jury, or be put to a public trial without such investigation.

The fact that the people, in adopting the Constitution, intelligently adopted the provisions concerning the grand jury, and the undisputed fact that most of the States have retained in their Constitutions the same system, tend to show that it is held in high esteem as affording valuable securities to the people.

Constitutions are practically the work of the people themselves; their agents or delegates frame them, but they are of no force until inspected and adopted by the people.

Since such slight importance was attached to this venerable institution by the legislature, it being treated as a mere regulation of practice in the courts, and the effect of their action upon individual rights being apparently ignored, we insert some quotations from eminent authors and jurists to show the estimation in which the grand jury has been held by the people.

Chief Justice SHAW, speaking of the provision made for the system in the Constitution of Massachusetts, says: "We are to look at it as the adoption of one of the great securities of private right, handed down to us as among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birthright. * * * The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment of a grand jury, in cases of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones v. Robbins*, 8 Gray, 342.

Chancellor Kent, referring to the provisions intended to guard the right of personal security, says they have been transcribed into the Constitutions of this country from Magna Charta and other fundamental acts of the British Parliament. He further says: "The substance of them is, that no person, except on impeachment and in cases arising in the naval and military service, shall be held to answer for a capital or other infamous crime, or for any offense above the common-law degree of petit larceny, unless he shall have been previously charged in the presentment or indictment of a grand jury." 2 Kent Com. 12.

Mr. Wharton says: "In the time of James II * * * a barrier was needed against frivolous State prosecutions, and this barrier grand juries presented. * * * In our own times a restraint is required upon the malice of private prosecutions and the violence of popular excitement, and it is to the adequacy of grand juries for that purpose that public attention has been turned." 1 Whart. Crim. Law, § 452.

Says Judge Story: "When our more immediate ancestors removed to America they brought this privilege with them as their birthright and inheritance, as a part of that admirable common law which had fenced round and imposed barriers on every side against the approaches of arbitrary power." Story Const., § 1779. Again he says: "It is obvious that the grand jury perform most important public functions, and are a great security to the citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies." Story's Const., § 1785.

Judge Wilson, formerly of the Supreme Court of the United States, in the third volume of his works, gives his opinion of the grand jury system in these words: "Among all the plans and establishments which have been devised for securing the wise and uniform execution of the criminal laws, the institution of grand juries holds the most distinguished place." Speaking as to the uncertainty of the date of its origin, and the particulars of its progress and improvement, he concludes: "But one thing concerning it is certain. In the annals of the world there is not found another institution so well adapted for avoiding all the inconveniences and abuses which would otherwise arise from malice, from rigor, from negligence, or from partiality in the prosecution of crimes." 3 Wilson's Works, 363, 364.

Judge FIELD, of the Supreme Court of the United States, in his charge to a grand jury of a United States Circuit Court, referring to the origin and value of the grand jury system, said, *inter alia*: "And in the struggle which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name, until at length it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown.

"In this country, from the popular character of our institutions, there has seldom been any contest between the government and the

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citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizens against unfounded accusation, whether it comes from the government or is prompted by partisan passion or private enmity." 2 Saw. 668, 669.

The above opinions are not quoted for the purpose of demonstrating that the grand jury system, in the present state of society and legal science, is the best system that has been devised for securing the protection of public and private rights, but rather to show the estimation in which the people may have held it at the adoption of the Constitution, and the necessity for great caution on the part of the legislature when dealing with the subject.

The supposition that such important rights could be diverted under cover of a title to prescribe the practice and proceedings of a class of courts of limited criminal jurisdiction would seem to fall within the class of legislation referred to in a note to section 1938 of vol. 2 of Story's Constitution, viz.: "It is not often that legislatures are so reckless as to disregard openly and boldly the restraints of the Constitution from which they derive their authority, but it cannot be denied that sometimes, when desirous to accomplish something that the spirit and intent of the Constitution forbid, they have questioned with close and technical nicety the words employed in order to discover whether it may not be possible to keep within the letter of the instrument, while defeating its plain and manifest purpose."

The only construction of those provisions of the Constitution conferring power upon the legislature to abolish the grand jury system, which are consistent with the principles of constitutional law, is that the legislature may abolish the entire system. Changes in the system itself may be made, or regulations made, but no portion of the State, or the residents thereof, can be deprived of the benefits or securities of the system as changed or regulated. To hold otherwise would be in conflict with section 1 of the fourteenth amendment of the Constitution of the United States, and in conflict with section 25, article 2, of our own Constitution, prohibiting the deprivation of rights without due process of law. The two

constitutional provisions above mentioned contain practically the same safeguards against the species of legislation under consideration.

The language of the former is: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." That of the latter is: "That no person shall be deprived of life, liberty or property without due process of law."

Any act of the general assembly which violates or ignores the foregoing provisions of the Federal or State Constitution must be held invalid to the extent of such violation.

We come now to consider the legislation in question from a somewhat different standpoint, to-wit, whether it affords due process of law within the constitutional meaning of that maxim or principle; and whether it can be said to comprise a part of the law of the land, within the meaning of that phrase.

The rights intended to be protected by the principles embodied in the above phrases are the rights of life, liberty and property; the manner of protecting them by the enactment of general laws recognizing the equal rights of every citizen, and providing for their due and uniform administration.

In order to be constitutional, they must make provision for equal protection to every citizen, in relation to these essential rights, and they must be uniform in their application to every person.

If the law of the State authorizes a prosecution for a felony only upon an indictment of a grand jury, a prosecution by another method would contravene the principles just mentioned.

It is pretty generally conceded by those learned in the law that the phrases "due process of law" and "law of the land," although verbally different, express the same thought, and that the meaning is the same in every case. Cooley's Const. Lim. *352, 353; Story's Const., § 1943.

Mr. Webster's oft-cited definition of the maxim, "by the law of the land," is as follows: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, his liberty, property and immunities under the protection of the general

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rules which govern society." *Dartmouth College v. Woodward*, 4 Wheat. 519.

Mr. Justice JOHNSON, of the Supreme Court of the United States, gives his view of these phrases thus: "As to the words from Magna Charta incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. O'Kely*, 4 Wheat. 235-244.

Of the above views of Judge JOHNSON, Mr. Cooley says: "We have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering."

Mr. Cooley himself defines the maxim thus: "Due process of law, in each particular case, means such an exertion of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes of cases to which the one in question belongs." Cooley's Const. Lim., § 356.

Judge STORY defines the privileges and immunities of the citizens of the States thus: "To be protected in life and liberty, and in the acquisition of property, under equal and impartial laws which govern the whole community. This puts the State upon its true foundation, a society for the establishment and administration of general justice, justice to all, equal and fixed, recognizing individual rights and not impairing them."

In speaking of the adoption of the fourteenth amendment to the Constitution of the United States, and of the similarity of the guaranties therein to those incorporated in the several State Constitutions, the same author says: "It is further declared by this article that 'no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' In a country where the rights of the individual citizen were already so well guarded it might seem like a work of supererogation to establish new guaranties, which after all in their purpose must have the same end as others already existing, and in their scope can perhaps embrace no more. * * * The securities of individual rights, it has often

been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor watch with too lively a suspicion the propensity of persons in authority to break through the 'cobweb chains of paper Constitutions.'" Story's Const., §§ 1935-1938.

In the case of *Rowan v. State*, 30 Wis. 129, the question of the power of a State to abolish the grand jury was considered with reference to the principles now under consideration.

Judge COLE, in delivering the opinion of the court, after referring to the origin and design of the fourteenth amendment to the Constitution of the United States, observed: "But its design was not to confine the States to a particular mode of procedure in judicial proceedings, and prohibit them from prosecuting for felonies by information instead of by indictment, if they chose to abolish the grand jury system. And the words 'due process of law' in this amendment do not mean, and have not the effect to limit the powers of the State government to prosecutions for crimes by indictment; but these words do mean law in its regular course of administration according to the prescribed forms, and in accordance with the general rules for the protection of individual rights."

The learned judge concludes that "if the people of the State find it wise and expeditious to abolish the grand jury, and prosecute all crimes by information, there is nothing in our State Constitution as it now stands, and nothing in the fourteenth amendment to the Constitution of the United States, which prevents them from doing so."

Mr. Justice MATHEWS, in *Hurtado v. California*, in demonstrating that due process of law, as employed in the fourteenth amendment, does not necessarily mean the institution and procedure of a grand jury in any case, says: "If in the adoption of that amendment, it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the fifth amendment, express declarations to that effect."

Justice MATHEWS proceeds to explain that the legislative powers of the States are not absolute and despotic, and it must not be supposed that the said fourteenth amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. The learned justice, while recognizing the inherent and reserved powers of the States to make their own laws and to alter them at pleasure, plainly says that these reserved powers must be exerted

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within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

He then proceeds to explain that the legislative powers of the States are not absolute and despotic, but that the due process of law, prescribed in the fourteenth amendment, may operate as a practical restraint "upon special, partial and arbitrary exertions of power under the forms of legislation."

This learned jurist further says: "It is not every act legislative in form that is law. Law is something more than mere will exerted as an act of power. * * * And the limitations imposed by our constitutional law upon the action of the governments, both State and National, are essential to the preservation of both public and private rights, notwithstanding the representative character of our political institutions." *Hurtado v. California*, 110 U. S. 535, 536.

From the foregoing expositions of the subject it is evident that a State which recognizes in its general course of legislation and judicial proceedings the fundamental principles of constitutional government, as embodied in the principles of the common law, conforms to the spirit and meaning of the maxims referred to. Properly construed these maxims interpose no barriers in the way of wholesome legislation of any kind, but they prevent special and class legislation, and all forms of legislation the effect of which is to extend privileges or securities to a portion of the community which are withheld from another portion, although relating to the same class of subjects.

So far as the laws are conformable to the constitutional provisions guaranteeing equal and impartial security and protection of the rights of the whole community, they become the law of the land, and the adjudication of individual rights thereunder is by due process of law.

The same principles are applicable whether we refer to the enactment of laws by general assemblies, or to their judicial interpretation. They must be so framed and so administered as to come within the constitutional landmarks, abridging the immunities and privileges of no person, but affording equal protection to all.

Our conclusion is that the provisions of the act of the general assembly under consideration, which prohibits the summoning and impanelling of a grand jury, in any Criminal Court, for the prosecution of felonious crimes therein, and which require the prosecution of all offenses, when originally commenced or instituted

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therein, to be upon information presented by the district or special district attorney, are in conflict with the mandates of the bill of rights of this State, and are therefore unconstitutional. We are further of opinion that the said Criminal Court erred in denying the petitioner's motion to quash the information filed against him by the district attorney, charging the petitioner with the commission of a felony, and that the conviction and sentence of the petitioner, upon the prosecution of said information, was absolutely void. It is therefore ordered and adjudged by the court that the petitioner be discharged from confinement in the penitentiary.

And it appearing to the court that sufficient legal cause exists for the commitment of the petitioner to answer any indictment which a grand jury of said county of Arapahoe might find against him in respect to the matters so charged as aforesaid, it is further ordered that the petitioner be remanded to the custody of the sheriff of Arapahoe county, and that upon entering into a recognizance before said sheriff in the sum of \$1,000, with good and sufficient sureties to be approved by the said sheriff, conditioned for his appearance at the next term of the District Court of said county, to answer any indictment that may be found against him concerning the alleged felony, he be discharged from custody.

1

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

MANSON V. PHOENIX INSURANCE COMPANY.

(64 Wis. 28.)

Mortgage — chattel — insurance of mortgagee's interest — rights as against creditors.

A mortgagee of chattels insured by a policy payable to him as his interest may appear, is entitled to payment of his claim out of the insurance moneys in case of loss, in preference to other creditors, although the mortgage was not properly filed.

GARNISHMENT. The opinion states the facts. The proceedings were dismissed below.

Phillips & Forward, for appellants.

Finch & Barber, for respondent.

COLE, C. J. The court below held that at the time of the service of the garnishee summons the garnishee defendant was not indebted to defendant Waller, and did not have any property or money in its possession belonging to him, therefore dismissed the proceeding. The correctness of this ruling is questioned by plaintiff's counsel. The facts upon which the questions of law arise are few and undisputed. It seems that the insurance company issued its policy to

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Waller, insuring a frame building owned and occupied by him as a saloon, and certain personal property therein. The frame building rested upon blocks and was upon land leased by Waller, who had the privilege of removing it at the expiration of his lease. The building seems to have been treated as a chattel, as it doubtless was. By an indorsement on the policy made when it was issued, the loss was made payable to one Stacy, mortgagee, as his interest might appear. Stacy held chattel mortgages on the building and certain personal property therein. The chattel mortgages were given to secure notes of even date, which were executed for money loaned. This indebtedness, beyond all question, was *bona fide*. The mortgages were not filed with the clerk of the city where the mortgagor resided, but with the town clerk of the town of Richmond. This is the only objection to the mortgages. The property was destroyed by fire, and the loss was adjusted before garnishee proceedings were commenced. At the time of the loss Waller was indebted to Stacy on the notes and mortgages in an amount exceeding the amount of the policy; and Waller gave to Stacy an order on the insurance company for all the moneys payable on the policy, and this order the adjuster of the company agreed to pay. This likewise was before the garnishment proceedings were instituted.

Now the counsel for the garnishee insists and claims that when the loss occurred Stacy became entitled to the insurance money under the clause in the policy making it payable to him, it appearing that the mortgage debt exceeded the amount of the policy. He says, under the decisions in *Appleton Iron Co. v. British Am. Assur. Co.*, 46 Wis. 24; and *Hammel v. Queen Ins. Co.*, 50 Wis. 240; s. c., 41 Am. Rep. 1, the legal title of the policy vested upon its execution in the mortgagee as effectually as if it had been subsequently assigned to him. His mortgage debt being greater than the amount of insurance, his interest was the whole interest of the policy. This is certainly the language of those cases. That the mortgagee had an insurable interest in the property does not admit of doubt. "The mortgagor has an insurable interest in the property to the full value of the goods insured; and the mortgagee has an insurable interest measured by the amount for which he holds the mortgage as security. Each, acting independently, may insure his own interest; but the more usual course is for the mortgagor to obtain a policy of insurance payable to the mortgagee in case of loss." Jones Chat. Mort., § 100; Wood Ins., § 257. The legal

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title to the personal property passed to the mortgagee, by virtue of the mortgage, even before the debt was due. This statement of the law has so often been announced by this court that it requires no reference to the cases which support it. The legal title of the property insured and of the policy being in Stacy, he has an unimpeachable right to the insurance money. In no sense can this money be said under the circumstances to belong to the principal debtor, Waller, so as to be liable to garnishment by his creditors; for by its policy the garnishee agreed to pay this money, in case of loss, to Stacy, as his interest might appear, and this was a perfectly valid contract. Consequently upon the facts it is clear that the garnishee, when served with process, had nothing in its possession which could be reached by Waller's creditors.

But the counsel for the plaintiffs contend that inasmuch as the chattel mortgages were not duly filed, the right of Stacy to the insurance money was lost, and the creditors of Waller could reach it by garnishment. We do not think this position sound. Though the mortgages were not filed in the proper office, still they were perfectly good as between the parties. The only effect of the failure to duly file the mortgages was to render them invalid as against purchasers or mortgagees in good faith, or creditors who had obtained liens upon the insured property by attachment or levy upon execution. It is said Stacy's right to the insurance money depends upon the stipulation in the policy and his mortgages. This is true. But the mortgages being good as between the parties, Stacy had an insurable interest in the property, measured by the amount of his *bona fide* indebtedness. He has the right to the insurance money, even as against the plaintiff. We find that this precise point is decided in *Coykendall v. Ludd*, 32 Minn. 529. The head-note clearly states the case as follows: "A creditor proceeded to garnish insurance money claimed to be due his debtor upon the loss by fire of a stock of goods covered by a policy of insurance, in which the loss, if any, was made payable to a third party, who appeared as claimant in the proceedings, as 'his interest' should appear. He claimed an interest in the goods by virtue of a chattel mortgage thereon executed by the debtor. Held, that as against the creditor plaintiff in the garnishment proceeding, such mortgage, if valid on its face and given in good faith, was sufficient to uphold the right of the claimant to the insurance money, to the amount actually due thereon, though the mortgage was never filed for record." In the opinion

the learned judge comments on the previous case of *North Star B. & S. Co. v. Ladd*, 381, in the same volume, which was cited and relied on by plaintiff's counsel. It will be seen how the cases are distinguished or reconciled by the court. The decision in the *Coykendall* case seems to us sound in principle, and we adopt it as a correct statement of the law upon the question we have been considering.

Our decision is placed upon different ground from that on which the court below decided it. The learned Circuit Court held that the order upon the insurance company given to Stacy by Waller after the property was destroyed amounted to an equitable assignment of the fund due upon the policy. Whether Stacy could hold the moneys, if his right to them rested on this order alone, is a question we need not decide. It is quite plain that his right to these moneys, under the policy and the mortgages, was not weakened by this order. But as his claim was good and valid without it, we need not consider what his rights would have been if they depended upon the order alone.

BY THE COURT. —The judgment of the Circuit Court is affirmed.
Judgment affirmed.

FUNK V. PAUL.

(54 Wis. 35.)

Mortgage — chattel — increase of animals — bona fide purchaser.

The increase of domestic animals mortgaged during gestation is not covered by the mortgage as against a *bona fide* incumbrancer thereof acquiring his lien without notice of the facts and after the period of nurture, but one who takes a mortgage thereof merely to secure a pre-existing debt is not a *bona fide* incumbrancer.

PETER GLEIM borrowed of the defendant \$750, and gave him his note for the amount, due in one year, secured by chattel mortgage on certain personal property, including six (6) milch cows in Gleim's possession, on his farm, by that description, and no other. That mortgage was duly filed the same day. Four of the cows were with calf, and dropped calves in April, 1883. These four cows and their four calves remained in Gleim's possession until March, 1884. Gleim being *bona fide* indebted to the plaintiff on a note for \$225, given in January, 1883, and due in

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January, 1884, to secure the same, and at the plaintiff's request, on October 8, 1883, executed and delivered to the plaintiff a chattel mortgage on personal property, including 'five spring calves' in the possession and on the farm of Gleim, and these calves include the four calves above mentioned, which mortgage was duly filed on the day it was given; and the only consideration therefor was a prior indebtedness on said note. In March, 1884, Gleim having given two other chattel mortgages, which were duly filed to other parties, upon his personal property, upon some of which they were first liens and upon the balance subsequent liens, ran away leaving the property on his farm. Thereupon a constable, acting as agent for all the mortgagees, took possession of all the property then on the farm covered by any of the mortgages, and after having advertised the same, sold all the property at public sale. At such sale, by an arrangement made by all the mortgagees, the defendant acted as treasurer, and received all the moneys and proceeds of the property sold. After the sale the mortgagees came together, and after paying from the proceeds the expenses of sale, settled among themselves the fractional shares of such moneys and proceeds to which they were severally and of right entitled, and such shares were severally paid over to them respectively by the defendant, except that both the defendant and the plaintiff claimed the net proceeds of the four calves mentioned, amounting to \$66, which sum the defendant refused to pay over to the plaintiff, but claimed it as his own under his chattel mortgage. All the moneys and property retained by the defendant, including the \$66, were insufficient to pay up the amount due on his note and mortgage. It was not necessary for a calf to follow a cow for nurture more than four months, and these calves, shortly after they were dropped, were kept by Gleim in a lot by themselves, separate from the cows, until after the plaintiff's mortgage was given. The plaintiff, at the time of taking his mortgage, had no actual notice of any prior mortgage.

To recover the \$66 so retained by the defendant this action was brought. In the justice's court the plaintiff obtained judgment, but on appeal the Circuit Court, upon the facts stated, gave judgment for defendant. From that judgment the plaintiff appeals.

Charles M. Scanlan, for appellant.

B. F. Dunwiddie, for respondent.

CASSODY, J. It has long been settled that "a grant of that which a grantor has potentially, though not actually, is good." *Grantham v. Hawley*, Hob. (182) 286; *Fonville v. Casey*, 1 Murph. 389; s. c., 4 Am. Dec. 559; *McCarty v. Blevins*, 5 Yerg. 185; s. c., 26 Am. Dec. 262. In this State a chattel mortgage given upon a crop of grain at or about the time it is sown, and before it is up, or has any appearance of a growing crop, is wholly inoperative upon such crop when grown. *Comstock v. Scales*, 7 Wis. 159; *Lamson v. Moffat*, 61 Wis. 153. But where such chattel mortgage has been given after the seed sown has sprouted and made its appearance above the ground as a growing crop, there can be no doubt but what it is operative and covers the grain when it comes into existence as the product or as an accession to what was growing when the mortgage was given and covered by it. *Bryant v. Pennell*, 61 Me. 108; s. c., 14 Am. Rep. 550; *Conderman v. Smith*, 41 Barb. 404.

On the same principle where the owner of a domestic animal gives a mortgage thereon during the period of gestation, the mortgagee will, as against the mortgagor, be entitled to the offspring when born. *McCarty v. Blevins*, *supra*; *Conderman v. Smith*, *supra*; *Hughes v. Graves*, 1 Litt. (Ky.) 317; *Evans v. Merriken*, 8 Gill & J. 39; *Forman v. Proctor*, 9 B. Monr. 124; *Fowler v. Merrill*, 11 How. 375, 396; *Kellogg v. Lovely*, 46 Mich. 131; s. c., 41 Am. Rep. 151.

But it is urged that notwithstanding the mortgage may cover the calves, as between the parties, yet as they are not described nor in any way referred to in the defendant's mortgage, the filing of it was not constructive notice to the plaintiff, and hence that his mortgage gives him the superior right. Had the defendant, upon obtaining his mortgage, taken possession of the cows, and retained them and the calves, when dropped, until after the plaintiff obtained his mortgage, then he undoubtedly could have held them as against the plaintiff. By reason of such possession the plaintiff and the world would have been conclusively presumed to know the defendant's interest in and right to the calves. Our statute authorizes the filing of the mortgage in lieu of such possession, and as equivalent to it. Section 2313, Rev. Stats. Such filing is constructive notice to third parties, subsequently dealing with the property, as to the rights and interest of the mortgagee in the property mortgaged. Such constructive notice is of course co-extensive with the contents of the mortgage so filed. But from the very nature of

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things, it cannot be constructive notice of facts existing *dehors* the mortgage and in no manner referred to in it, unless the contents of the mortgage, together with the facts and circumstances connected with the mortgaged property or its possession, are such as to give actual or constructive notice of the rights of the mortgagee to those subsequently dealing with the property; or at least sufficient to put them upon inquiry. While the calves were following the cows for nurture, it may be that a person acquiring an interest in them by purchase or mortgage would be presumed to know that the mortgage was given during the period of pregnancy.

In *Forman v. Proctor*, 9 B. Monr. 124, it was held "that the first mortgage * * * must be regarded as covering and including, for a reasonable time, the produce or descendants of the female animals conveyed by the mortgage, these being incident to the legal title and the right of immediate possession vested in the mortgagee, for whom the mortgagor holds the possession." The "reasonable time" mentioned manifestly meant the period during which the young followed their mothers for nurture. In *Winter v. Landphere*, 42 Iowa, 471, the mortgagor sold the calves when they were eighteen months old, and the court said "the time had passed when it was necessary for their nurture to permit them to follow the cows. At such time it is unnatural to separate the calf from its dam, when it is not taken to the butcher. The two are then usually disposed of together. It may be that during that time the law would regard the calf as covered by a mortgage on the cow. * * *

* A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property conveyed is sufficient. Nothing short of this will import notice to purchasers." To the same effect is *Thorpe v. Cowles*, 55 Iowa, 408.

The case of *Winter v. Landphere*, *supra*, is cited approvingly in *Darling v. Wilson*, 60 N. H. 59; s. c., 49 Am. Rep. 305. But the court in this last case goes further and declares that "there being nothing in the mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien existing only as an incident to the mortgage, would, as between the parties continue so long only as is necessary for the suitable nurture of the increase. This view is supported upon sound principles." To our minds this view cannot be sustained upon sound principles. The lien was created by the mortgage, and so far as the mortgagor is

concerned, was entirely independent of the nurture. The mortgage was a valid lien upon the increase, as against the mortgagor in possession, and he necessarily knew, when the mortgage was given, the young dropped, and the period of gestation, and hence there would seem to be no valid reason for terminating the lien, as against the mortgagor, merely because the period of "suitable nurture" had passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mortgagor the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage. But as to subsequent *bona fide* purchasers and mortgagees without notice the question is different. As to them, the period of nurture being passed, and the young being entirely separated from the mother, and not being mentioned in the mortgage, nor any longer connected with the mother covered by the mortgage, they have neither actual nor constructive notice of the mortgagor's rights and interests, nor any thing to put them upon inquiry.

In the case before us the period of nurture had passed, and the calves were kept by the mortgagor in a field separated from the cows, so that a *bona fide* purchaser or mortgagee without notice would have been protected. Was the plaintiff such mortgagee? He took the mortgage to secure an indebtedness incurred many months before and not yet due, and without any new consideration. The mortgage, though requested, was purely voluntary, and gave the mortgagee no greater right or interest in the calves than the mortgagor possessed. *Bowman v. Van Kuren*, 29 Wis. 209; *Body v. Jewson*, 33 Wis. 409; *Bay v. Coddington*, 5 Johns. Ch. 54; s. c., 9 Am. Dec. 268; *Atkinson v. Brooks*, 26 Vt. 569; s. c., 62 Am. Dec. 592. To constitute a *bona fide* purchaser or mortgagee, there must not only be an absence of notice, but also a payment of, or fixed liability for, the consideration. *Nantz v. McPherson*, 7 T. B. Monr. 597; s. c., 18 Am. Dec. 216; *Cummings v. Coleman*, 7 Rich. Eq. 509; s. c., 62 Am. Dec. 402; *Wynn v. Carter*, 20 Wis. 107.

BY THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Pierce v. Pierce.

PIERCE V. PIERCE.

(64 Wis. 72.)

Parent and child — allowance to mother for support of child — estoppel.

The parents of a minor child lived in separation, and the mother supported it. Lands were subsequently devised to the child, the child died, and the parents became its sole heirs. *Held*, that the mother was entitled to allowance out of its estate for such support, and she was not estopped by a partition of the lands made on her petition between herself and her husband.

CLAIM for allowance for support of child out of his estate. The opinion states the case. The defendant had judgment below.

A. Hyatt Smith, for appellant.

Salé & Pierce, for respondent.

ORTON, J. Prosper A. Pierce died, leaving a will, by which one third of all his property was devised to the appellant and her four children, share and share alike, and the respondent was executor. One of said children was Harvey Pierce, born in 1871, and died in 1876. The husband of the appellant, and father of said children, was George M. Pierce, who lived separate from his family, and the appellant boarded, cared for, supported, maintained, and clothed the said Harvey, with the other children, during his life, by her own exertions, and at her own cost and expense. The share of said Harvey, deceased, in said estate descended to his father and mother, as his only heirs, and was of the value of about \$900. George M., the father, deeded his share thereof to one Blunt, and Blunt deeded the same to Stephen C. Pierce, the said respondent. The appellant became administrator of the estate of her son Harvey, deceased, and presented her claim for the care and maintenance of said Harvey to the County Court, which was disallowed, and she appealed to the Circuit Court, and said order was affirmed, and her claim again disallowed, with full costs, in favor of the said Stephen, the contestant. These facts appear in the finding of the Circuit Court and history of the case.

The learned counsel of the respondent contends that the appellant, as the mother of Harvey, was bound as his natural guardian to support him gratuitously, and that she is estopped by the parti-

tion of the estate of Harvey between herself and said respondent, for which she was the petitioner, and these are the only questions in the case. The learned counsel of the appellant contends that in equity she is entitled to such allowance out of the estate of Harvey, as against her co-heir and husband, who utterly failed to support, or contribute to the support of the child Harvey.

As to the claim that the appellant is estopped, and that Stephen C., the respondent, is an innocent purchaser, and should be protected against said claim for an allowance, it is sufficient to say that the partition and the conveyances are subordinate and subject to the settlement of the estate of Harvey and the payment of claims against it, and further, as to the conveyance, it does not appear that the grantees paid value, and the said Stephen C. purchased with notice, and further, as to the partition, it is not inconsistent with the claim, and so far as it imports title in Stephen C., such title is subordinate and subject to the payment of claims against the estate.

The authorities cited by the learned counsel of the respondent on the main question are none of them in point, and some of them are clearly in conflict with the weight of authority. In *Dedham v. Natick*, 16 Mass. 135, the question was of pauper settlement of the children after their pauper father had died and the mother had again married and moved to another town. The court said incidentally that in such a case the mother was the head of her family of such children, and had control of them, and bound to support them, if of sufficient ability, the same as their father would have been if living, and this is made the test of their legal settlement. Reeves Dom. Rel., cited, has the following note: "As a general rule, as between the father and mother, the obligation to support the child rests principally upon the father." *Cummings v. Cummings*, 8 Watts, 366, was an action of *assumpsit* by the administrator of the estate of the mother for the support of her infant daughter. It was simply held that such support raised no such *assumpsit*. In *Hays v. Seward*, 24 Ind. 352, the father died after devising his estate to his widow for life, which consisted of a farm on which the family lived, and which she enjoyed and used. It was held that there was no implied *assumpsit* by her child to compensate her for its support in infancy. *Darley v. Darley*, 3 Atk. 399, was the case of a father seeking to apply the legacy left to his child to its support. No case cited on behalf of respondent approximates anywhere near this case in its facts and equities.

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On the other hand, a widow who had supported her daughter during infancy, she having an estate of her own, maintained an action against the daughter after she became of age for such maintenance. *Whipple v. Dow*, 2 Mass. 415. In *Daves v. Howard*, 4 Mass. 97, it was held that the father was bound to support his child and yet an allowance was made to him out of the child's estate for such support, the father being in indigent circumstances; and it is said "the father was bound to support his child, but the mother was not." In 2 Kent Com. 192, it is said: "The father is bound to support his minor children if he be of ability, even though they have property of their own. But this obligation in such a case does not extend to the mother," and many cases are cited to this text, some of which will be found hereinafter noticed. And the author says further: "And the rule as to the father has been relaxed. The courts now look with great liberality to the circumstances of each particular case, and to the respective estates of the father and children."

In Schouler Dom. Rel. 239, it is said: "It is nevertheless clear that the courts show special favor to the mother, as they should; and if the child has property they will rather in any case charge the expenses of his education and maintenance upon such property than force her to contribute hers;" and many cases are cited. And it is said further: "A Court of Chancery will not readily make the support and education of infant children a charge upon the property of their widowed mother," etc., citing many cases. *Haley v. Bannister*, 4 Madd. Ch. 275. In *Hughes v. Hughes*, 1 Brown C. C. 388, an allowance for the maintenance of the children was made to the parents out of the children's estate. In *Lanoy v. Duke and Duchess of Athol*, 2 Atk. Ch. 444, the widow was allowed for the maintenance of her daughter out of her estate. In *Ex parte Petre*, 7 Ves. Jr. 403, a very large allowance was made to the mother for the support of her son out of his estate. In *Bruin v. Knott*, 9 Jur. Ct. Ch. 979, the widowed mother was allowed for the past maintenance of the son out of his estate after his death. In *Reeves v. Brymer*, 6 Ves. Jr. 425, the father was made an allowance for the past maintenance of his infant daughter out of her estate, and this was said to be the settled rule. And in *Sherwood v. Smith*, 6 Ves. Jr. 454, the father was allowed both for the past and future maintenance of his children out of their estates. In *Watts v. Steele*, 19 Ala. 656; s. c., 54 Am. Dec. 207, a similar allowance was made.

In *Voessing v. Voessing*, 4 Redf. 360, the father died, and the mother became guardian and supported the infant daughter until she died. The mother was allowed out of her daughter's estate for her support from the time of the father's death. The authorities were quite fully examined, and the conclusion reached that there was no inflexible rules in such cases, but that each case must be determined on the facts peculiar to it. The rule in all cases is one of equity, and where it would seem equitable and just, an allowance out of the infant's estate will always be made, even for past support, especially to the mother when she is a widow and charged with the custody of her children in the place of the father.

I have cited more cases, and the principle involved in each, because this court would differ from the learned judge who decided this case at the Circuit with great hesitation, and only after a full examination of the authorities on the question, when he had not the same facilities and time for a full examination of the question, aided by the elaborate brief of counsel; for with such facilities and time he would be very likely to arrive at a proper legal conclusion in all cases. The fact that the mother for a considerable part of the time supported the child when it had no estate, and she could not have had any expectation of an allowance therefor, can make no difference in equity, as her right to any allowance in such a case does not depend upon contract, either express, implied, or an implied *assumpsit*.

The facts of this case appeal most strongly to a court of equity. The father was legally bound to support this child. He failed to do so, and most unnaturally imposed this burden upon his wife. Notwithstanding his shameful neglect of one of the first duties of a father, he would shield his portion of the inheritance from his dead and long neglected child from an equal contribution with the mother, who had borne the whole burden of his maintenance during his life, to her partial compensation. He ought to expect no favor from the court, for he deserves none. One-half the estate of his son must be treated as still his, subject to the payment of all just charges thereon in its administration. Stephen C. Pierce, the respondent, and who has most strangely secured title to a portion of the estate of which he had been the executor under will of Prosper A. Pierce, deceased, is the only representative of this father in this most groundless controversy. Many cases cited arose when the child was still living to enjoy and require the estate, and yet in equity it was

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held chargeable with his support during his infancy, especially in favor of the mother. Here the child is dead, and his estate can only benefit his father and mother. Shall he enjoy the full benefit of it, while her portion has been more than consumed by discharging his duty to the child? It is impossible to conceive a case appealing stronger to a court of equity than this claim as a charge upon the estate of Harvey Pierce, deceased.

TAYLOR, J. (dissenting). I am unable to assent to the conclusion arrived at in the opinion of the court in this case. Had the opinion limited the right of the mother to charge the estate of her deceased child with its support from the time it acquired an estate until its death, I should not have felt called upon to dissent, although I should then have very grave doubts whether such charge should be made, under all the circumstances, against the child's estate after such a lapse of time and so long after its death. No case can be found I think, in which a court of equity has ever charged the after-acquired estate of a child, and especially a mere infant, with the cost of its nurture from its birth until the time such estate was acquired either in favor of the father or mother, under any circumstances. The law of nature, as well as the law of this State, charges the parent with the support of his or her infant child, when of sufficient ability, and if such ability does not exist, the State itself provides such support. If the mother can charge the after-acquired estate of her child for its previous support when such estate is the gift of its grandfather, why may she not charge such after-acquired property of the child which is the result of its own labor and exertions? And if the statute of limitations was not in the way, why might not the claim be urged at any time during the life-time and after the death of such child after coming of age? Certainly the fact that the child died during its minority cannot make the mother's claim more obligatory than if the death had occurred after its coming of age.

By the death of the child in this case, the mother inherited one-half of its estate, which was some compensation for the nurture she had given it during the few years of its life, and should be some reason why a court of equity should not allow her claim against its estate for its support. I cannot see how the fact that the other half of the estate goes to the father of the child at its death can give the mother any other or greater claim on the estate for its

support than she would have had in case the father had died before the child, and its estate had gone in some other direction. This is not an action at law or in equity between the mother of the child and her husband, its father, in which the mother claims of the husband and father compensation for the support of their child by her out of her separate estate, on the ground that it was his legal duty to support such child by his exertions and out of his estate, and therefore he should make her separate estate good for what she expended in its support. As I understand it, it is a claim made against the estate of the deceased child, and if she has no claim against that estate her action must fail, and it cannot be sustained on the ground that in equity the husband ought to reimburse her for the support of their infant child.

It is true the husband is interested as co-heir of the estate with his wife to defeat her claim against the estate of the child; but that does not authorize her to set up any equities she may have against the husband to establish a claim against their child or its estate. The County Court would have no jurisdiction of an action brought by the wife to charge her husband or his estate during his lifetime with the money expended by her out of her separate estate for the support of their child, on the ground that the law cast the burden of such support upon him and his estate primarily, even if it should be admitted that such an action could be maintained in the Circuit or other court of competent jurisdiction; and yet that is what the wife seeks to do indirectly by filing her claim against the estate of her deceased child in the County Court, and asking that court to allow such claim because she has an equitable claim for such support against her husband, who is still living, and over whose estate the County Court has no control.

Upon the findings of the court, the claim of the mother for the support of the child from the time of its birth to the time when it received its estate from its grandfather, exceeds the whole value of the estate so received by the child. Now suppose the mother had, immediately on the death of the grandfather, applied to the court to have that estate applied to the satisfaction of her claim for support up to that date, would the court have been justified in so applying it? Clearly not. Had it appeared to the court that the father and mother were unable to give the child proper support, it might have applied the income of its estate, and under proper circumstances, the principal thereof, to its future support. Certainly

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it would not have applied the estate to discharge the claim of the mother for past support, and leave its future support a charge upon the State, or upon the father and mother, who appeared to the court unable to support it.

The will of the grandfather shows that it was not intended by him that the estate given to the child should be appropriated by the mother for its past support, nor even for its future support, unless it should become necessary to so apply it on account of the inability of the father and mother to give the child a proper support during its minority. It is given to the mother in trust, to be held by her during the minority of the child, and as such trustee she could only use such part of the estate so granted as was necessary for its support after it became vested in her as trustee, and during such minority.

Again, there is nothing in the record that shows that Anna E. Pierce, the mother of said infant, had not, at the time she supported her child, and for which support she claims pay out of its estate, an abundance of means of her own out of which she could and did furnish support. The question of the ability of the parent to support his or her infant child is always an important consideration when an application is made to a court of equity to have the estate of the infant applied to such support during its infancy; and this is especially the case when it is sought to apply any thing toward such support beyond the income of its estate.

It is urged in the opinion of the court that the husband should have supported the child, instead of the mother, and because he failed to furnish such support the mother should be allowed to charge the estate of the child with such support. To my mind that does not follow. If the husband had the ability to support the child, and neglected to give it such support, and the burden of its support was cast upon the mother unjustly, and she furnished it, that fact furnishes no reason for charging the child's estate with such support, although it might furnish a reason for charging the estate of the husband in favor of the wife for the money so expended by her. But as suggested above, that is a controversy over which the County Court has no jurisdiction. When the wife brings her action in a proper tribunal to charge the husband or his estate for such support, for aught that appears in this case, he may be able to show that his wife's support of the child was, as between himself and her, a burden she ought to bear. At all events, there is

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nothing in this record which shows that it was inequitable as between the husband and wife—that at the time such support was given by the wife she was not justly chargeable therewith. She may have had an estate of her own separate from her husband; she may have separated herself from her husband without just cause, and taken her infant child with her; or there may be other reasons why, as between herself and her husband, she ought to have given the child its support. Of the circumstances under which the support was granted he know nothing, except that the mother nurtured her infant from its birth until its death, under six years old, as every mother would naturally do, and now seeks to charge the estate of the child, which came to it a little over a year before its death, with the cost of such support. As said above, no precedent can be found for the allowance of such a claim, and I cannot consent to help make such a precedent.

BY THE COURT.—The order and judgment of the Circuit Court are reversed, and the cause is remanded with instructions to reverse the order of the County Court and to order said County Court to allow the claim as a charge upon the estate of Harvey Pierce, deceased.

Judgment reversed.

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(64 WIS. 84.)

Evidence — bastardy — resemblance of child to defendant.

In bastardy proceedings the child may not be exhibited to the jury to show its resemblance to the defendant, nor may counsel draw attention to, and comment on the resemblance. (*See note, p. 592.*)

BASTARDY proceedings. The opinion shows the case.

G. W. Cate, for plaintiff in error.

Attorney-General, for defendant in error.

TAYLOR, J. This was an action to charge the plaintiff in error with the support and maintenance of a bastard child. On the trial in the Circuit Court the State was permitted, against the objection of the plaintiff in error, to bring into court, and exhibit to the ju-

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rors for their inspection, as evidence in the case, the child of which he was charged with being the father; such child then being less than one year old. This is assigned as error in this court. The plaintiff also assigns as error that the counsel for the State was permitted to comment to the jury and draw their attention to the alleged similarity of the ears of the child to the ears of the plaintiff in error, as well as to the ears of the plaintiff's father, who was also in court and in the presence of the jury, the child at the time being absent.

Upon the question of the propriety of exhibiting the child to the jury as evidence in cases involving its paternity, the decisions of the courts are not in harmony. In North Carolina the Supreme Court of that State hold that such exhibitions may properly be made. See *State v. Woodruff*, 67 N. C. 89; *State v. Britt*, 78 N. C. 439; *Warlick v. White*, 76 N. C. 175; and *State v. Bowles*, 7 Jones Law (N. C.), 579. The same was held in the Supreme Court of Iowa in *State v. Smith*, 54 Iowa, 104; s. c., 37 Am. Rep. 192. In this last case the child was over two years old; but in the case of *State v. Danforth*, 48 Iowa, 43; s. c., 30 Am. Rep. 387, the same court held it was improper to exhibit to the jury a child only three months old. In *Eddy v. Gray*, 4 Allen, 435; *Jones v. Jones*, 45 Md. 144; *Keniston v. Rowe*, 46 Me. 38, the courts hold that testimony of witnesses that child looks like or resembles in appearance the person charged to be the father is not admissible, and in *Reitz v. State*, 33 Ind. 187, and *Risk v. State*, 19 Ind. 152, it was held error to permit the prosecution to give the child in evidence, so that the jury might compare it with defendant who was present in court.

In the *Douglas* case, Lord MANSFIELD is reported as saying: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile and various other things; whereas a family likeness runs generally through all these, for in everything there is a resemblance; as of features, size, attitude and action." This language, attributed to Lord MANSFIELD, is taken from *Wills on Circumstantial*

Evidence, *94 (3d ed. 113; 5th Am. ed. 117). This author, on the next page, says that in a Scotch case, when the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant as being too much a matter of fancy and of opinion to form a material article of evidence. In the case of *Jones v. Jones*, 45 Md. 144, the learned judge who wrote the opinion refers to the language used by Lord MANSFIELD in the *Douglas* case, and disapproves of it as authority, and thinks it has not been followed as a precedent in the English courts; and he quotes with approval the language of Justice HEATH in the case of *Day v. Day*, decided in 1797, in which the learned judge stated to the jury "that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence." The learned judge in the case of *Jones v. Jones*, *supra*, in disapproving of the language used by Lord MANSFIELD, says: "We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another with equal knowledge of the parties between whom the resemblance is supposed to exist."

It should be remembered that in the *Douglas* case, and the Maryland case, the question of parentage was as to a person who was full grown. So that if there is any thing certain in family likeness it would be fully developed, and if in any case such claimed likeness could be considered by a jury in determining the question of parentage, it would be in a case of that kind. In the case of *Jones v. Jones*, the court seemed to be of the opinion that "when the parties are before the jury, and they can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others to be considered."

In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, when a family likeness will be fully developed if there be any. And when applied to the immature child its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury.

The learned author of "Beck's Medical Jurisprudence" says:

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“It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This however is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them. There is however a circumstance connected with this which, when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a different race from the husband or paramour, as when a mulatto is born of a white woman whose husband is also white, or of a black woman whose husband is a negro.” In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father. *Warlick v. White*, 76 N. C. 175. In a case like the one at bar, we think no exhibition should be made.

Justice LYON, in the case of *Washburn v. M. & L. W. R. Co.*, 59 Wis. 364, 370, says: “To allow jurors to make up their verdict on their knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefits of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or the grounds of such opinions cannot be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the Appellate Court to affirm judgments on the facts, when all the evidence is before it and there is none whatever to support the judgment.” This reasoning clearly shows the impropriety of permitting the jury to base their judgment, in whole or in part, upon their inspection of the child exhibited to them in court. If the child itself, when presented to the jury for inspection, is or may be evidence in tending to prove its parentage, then this court upon appeal could not reverse their verdict, although the written bill of exceptions entirely fails to support such verdict, for the reason that this court would not have before it all the evidence in the case upon which the jury acted.

The learned attorney-general says the bill of exceptions does not show that the child was exhibited to the jury as evidence in the case. In this he appears to be mistaken, as in the part of the bill of exceptions which follows the reporter's notes of the evidence, it is clearly stated that "in course of the trial the plaintiff produced in court the child claimed to have been begotten by the defendant, and proposed to exhibit the same to the jury as evidence that it was the defendant's child. The defendant objected, and the court ruled that the child might be exhibited in evidence, but that no comments should be made." This statement, it will be seen, is made a part of the bill of exceptions.

The comments made by the counsel for the State to the jury in his argument, calling the attention of the jury to a peculiarity of the ears of the defendant and of his father, and his assertion that the child had the same peculiarity as to the ears, in the absence of the child, and without its appearing that the attention of the jury had been before called to such alleged peculiarity of the ears of the child, the defendant, or his father, were highly improper and were likely to prejudice the rights of the defendant. This impropriety on the part of the prosecuting attorney might, in itself, be sufficient ground for a reversal of the judgment, in the absence of any direction on the part of the presiding judge to the jury to disregard entirely the statements so made by the counsel, and a clear statement to the jury by such judge of the impropriety of such comments on the part of the counsel in his argument.

For the errors in permitting the child to be exhibited to the jury as evidence in the case tending to prove its paternity, and on account of the impropriety of the counsel for the prosecution in calling the attention of the jury to the alleged peculiarity of the child's, the defendant's, and his father's ears as above set forth, the judgment of the Circuit Court must be reversed.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Judgment reversed and remanded.

NOTE BY THE REPORTER.—In *People v. Carney*, 29 Hun, 47, a bastardy proceeding, the district attorney was allowed to ask the mother, as a witness, to look at the child then in court, and tell what the color of its eyes was. *Held*, error. The court said: "This evidence enabled the court to compare the color of the child's eyes with those of the defendant, who was present in court. We do not regard this kind of evidence as safe or proper. In the case of *Petrie v*

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Howe, 4 Thomp. & C., the question was as to the color of the child's hair. It was *held* in that case that such evidence was calculated to and probably did prejudice the defendant, that it was improper, and a new trial was granted. The argument used in that case in reference to the color of the hair applies with equal force in this case as to the color of the eyes. Common observation reminds us that in families of children different colors of hair and eyes are common, and it would be dangerous doctrine to permit a child's paternity to be questioned or proved by the comparing of the color of its hair or eyes with that of the alleged parent."

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(64 Wis. 111.)

Partnership — compensation of one partner for services.

A partner may recover compensation for his services in the firm business if there was an implied agreement therefor.

PARTNERSHIP accounting. The opinion states the case. The plaintiff had judgment below.

Fish & Dodge, for appellant.

Quarles & Winslow, for respondent.

COLE, C. J. The facts of this case seem more consistent with the hypothesis that the plaintiff and defendant, Henry S. Durand, were partners *inter sese* in carrying on the business of manufacturing linseed oil at Racine than any other. The real relation of the parties has to be gathered by inference from their acts and the manner the business was conducted. There was no contract, either written or parol, clearly proven, to which reference can be had to ascertain their rights and liabilities. The plaintiff and Mr. Durand differ widely as to what was said and understood by them when they engaged in the enterprise, and there is no stronger reason for attaching credit to the statements of one than the other. As far as we can judge, they are of equal intelligence and credibility, and where their statements are in conflict, they neutralize each other, except where sustained by other independent testimony. The plaintiff says that he did not understand he was entering into a general partnership with Mr. Durand to carry on this business, and

he repudiates the idea that Durand was ever his partner. He states that he supposed Mr. Durand, as the result of their negotiations, was to contribute from the trust funds in his hands, belonging to his daughters, \$10,000; that this sum was to receive its proportionate share of the profits earned by the capital stock employed in the business, after the expense in carrying it on had been deducted. But he did not understand that Mr. Durand expected to be, or was in fact, personally interested as a partner in the business. His idea of his relation to the parties, and the responsibility he assumed under the contract, may be gathered from the following extracts from his testimony:

He says: "I never considered there was an agreement to form a partnership with Mr. Durand. I didn't consider there was any partnership formed, unless the partnership was a special partnership with his daughters, as he told me. I didn't understand the amount put in to be a loan. Mr. Durand had some money that belonged to other parties. I understood him that it was not his. He told me it was not; that it belonged to his daughters, and that he would put it into the business. He put it in in the name of his children, in trust. My construction of our relation was that this money belonged to the children, and they held the relation to me of special partners. I had no idea of forming a partnership personally with Mr. Durand." Folios 155, 156. In another place he says: "The paper that I considered myself liable for, with the exception of the \$20,000 in as capital, was \$35,000 to Durand as trustee, and the rest at the bank. It all amounted to \$95,000 at one time. I thought I was solely liable on the \$35,000 loaned by Durand, trustee, except the capital of \$10,250 put in. I thought the girls were liable to the amount put in, and nothing more. I considered them special or limited partners. I knew of no way to get any thing out of them. I understood from the law that the estate was not liable beyond the amount invested. I know a partner is liable to the amount of his means; but when they were infants I don't suppose they were liable because they could not give their consent." Folio 196.

These extracts show the plaintiff's understanding of the matter. But the difficulty about this arrangement is that Mr. Durand's daughters were minors, incapable of making a binding contract of partnership, whether general or limited. Besides it does not appear that either of them ever attempted to make such a contract, or was

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ever consulted about engaging in this business. And now they deny in their answer any partnership, and disclaim any interest in the assets or profits of the concern. It may well be that the plaintiff assumed a peculiar responsibility in respect to the trust funds, if any there were, which were invested in the enterprise. Suppose the business had been unsuccessful and the entire capital lost, would not the plaintiff have been liable to the *cestuis que trust* for the amount of their funds put into it, even though he and Mr. Durand had actually been partners? We are inclined to think he would have been liable under the rule of law that where a trustee, in violation of his duty, invests trust funds in a business, the responsible party interested in that business, who knows the character of the funds, is liable to the *cestui que trust* for it. This unusual responsibility which plaintiff incurred in consequence of the investment of trust funds in the enterprise, with his knowledge, may be a circumstance to be taken into account when the question whether he should be allowed any compensation for his services in the management of the business is considered. It was doubtless a larger measure of liability than a partner ordinarily assumes in respect to the capital stock invested. But still we cannot see that that fact has any tendency to disprove the claim that a partnership was formed between the plaintiff and Mr. Durand. And Mr. Durand testifies that such a partnership was entered into, and his statements on this point are corroborated by many facts and the general course of dealing. We therefore feel warranted in assuming that these parties were partners in this business, and equally interested in the concern.

Such being the case, the important question arises whether, upon all the facts which are well established by the evidence, the plaintiff can be allowed any compensation for his services in managing the business. On this point it is not claimed that there was any express agreement that he should be paid for his services, but it is said under the peculiar circumstances the court will imply such an agreement. It is frankly admitted by the learned counsel for the plaintiff, that as a general rule, one partner cannot charge the other partner for services rendered in the business of copartnership unless there is an express agreement to that effect, or where such an agreement may be implied from the course of business between the partners, or from the nature of the services performed being such as are not usual for one partner to render without receiving a compensation therefor. The authorities cited state the law sub-

stantially in that language. And the reason given for the rule is that "there is an implied obligation in every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern." Story Part., § 182. "Each partner, in taking care of the joint property, is, in fact, taking care of his own interest, and is performing his own duties and obligations implied in, and constituting a part of the consideration for the others to engage in the partnership; and the law never undertakes to measure and settle between the partners the relative value of their various and unequal services bestowed on the joint business." Story Part., § 182.

This is the ordinary statement of the rule of law upon this subject. But still the rule, that each partner must be assumed to render his services in the partnership business gratuitously, is not inflexible or of universal application. It has its exceptions founded in wisdom and experience. Where it can be fairly and justly implied from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained. This principle is fully recognized in the following cases: *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Caldwell v. Leiber*, 7 Paige, 483; *Lewis v. Moffett*, 11 Ill. 392; *Levi v. Karrick*, 13 Iowa, 344; *Godfrey v. White*, 43 Mich. 171; *Cramer v. Bachmann*, 68 Mo. 310; and *Sheridan v. Healy*, 15 Chi. Leg. N. 104. So where a partner fails to perform his agreement to render services to the firm, he may be charged on the settlement of the firm accounts with the value of the services which he agreed to give and refused to render. *Marsh's Appeal*, 69 Penn. St. 30.

This case differs in many important particulars from ordinary partnerships. The question is, can an agreement to pay the plaintiff what his services were reasonably worth for the management of the business be fairly implied from the circumstances of the case and the acts of the parties? "The intention of the parties to any particular transaction may be gathered from their acts and deeds in connection with surrounding circumstances, as well as from their words; and the law therefore implies, from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials not under seal." Add. Cont. 201; *Tyler v. Burrington*, 39 Wis. 376. In this case, as in many others,

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there may exist facts and circumstances so clear and unequivocal in their tendency as to be equivalent to direct and positive proof of an express contract to pay for services performed. We shall only allude to a few of the leading facts which tend in that direction. We have referred already to the fact that trust funds were invested in the enterprise—for this is a legitimate inference from the evidence—and that the plaintiff would doubtless have been liable to make good these funds to the *cestuis que trust* in case the capital had been lost. So too the *cestuis que trust* had the right as against both partners, on the facts disclosed, to claim their share of the profits arising from the use of their money in the partnership business. Besides in our estimation the evidence clearly and satisfactorily shows that the plaintiff had the entire control and management of the business, in all its branches and details, from the very inception of the adventure for about ten years. He gave his entire time and attention to it. He superintended the construction of the mill, purchased machinery for it, and superintended the making of the additions and improvements. It is true he consulted Mr. Durand on these matters, and the latter made some suggestions as to the work, and occasionally visited the mill while it was being built and improved. But that the plaintiff had the entire charge and responsibility of the erection of the mill and improvements is a fact so clearly established as not to admit of doubt in our minds. The labor and care of operating the mill was performed and rested with the plaintiff and those employed by him. He hired the men and paid them; attended to the matter of procuring flax-seed and other stock; looked after the process of manufacturing it into oil, and to the selling of the manufactured products. He looked after the finances. Says Mr. Northrop, the cashier of the Manufacturers' National Bank, the institution with which the principal banking business was done: "The banking business of Emerson & Co. was transacted by Thomas J. Emerson and William T. Emerson in respect to deposits, drawing checks and borrowing money, except so far as Durand gave his notes." The plaintiff thus had the charge of the business in all its branches and details, gave his entire time and labor to its management, while Mr. Durand, from the nature of his engagements, could not, and in fact did not give scarcely a day or the least attention to it; for during all this period Mr. Durand was employed by the year by the Home Insurance Company, of New York, on a salary of \$10,-

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000, and as he says, was "subject to call during all that time, as the exigencies of their service should require." He had an office in Chicago, where he spent the greater portion of his time attending to his insurance business. He came home usually Saturdays, when he sometimes saw the plaintiff and visited the mill. But the business of the mill was not to interfere with his engagement to the insurance company, and it is very plain it did not. His services and time were faithfully given to the company that employed him. He did not, either as an individual or as trustee, put as much capital into the concern as did the plaintiff. Nor did he, either as trustee or personally, raise as much money for working capital as did the plaintiff on his individual credit.

When these facts and others of a like tendency are considered, they afford to our minds sufficient ground for implying a contract to compensate the plaintiff for his services in the management of the business. It is unreasonable to suppose the parties intended or understood that the plaintiff would give his entire time, attention, skill and ability to the promotion of the common enterprise, while Mr. Durand, working for an insurance company on a large salary, should really contribute neither time nor attention nor labor, and that both should stand upon the same ground as to profits, and the plaintiff be paid nothing for his services. But without dwelling longer upon the evidence bearing upon this point, we conclude by saying that a contract to pay for services rendered may be as fairly and incontrovertibly established by the acts and conduct of the parties, in connection with surrounding circumstances, as by words. Such a contract we think may reasonably be implied in this case.

The learned counsel for the defendants in his brief indulges in some remarks as to the ability, sagacity, large business experience and unlimited financial resources of Mr. Durand, which he claims were of great aid to this manufacturing enterprise. It is not necessary, nor would it be according to the truth, to deny that Mr. Durand is an able and sagacious business man,—one of experience and of good credit in the mercantile world. The fact that he is employed by one of the leading insurance companies of the country on a salary of \$10,000 is a sufficient guaranty of all this. But still his skill, experience and ability were not of that essential aid or advantage to the partnership business as counsel claims, because they were not devoted to promote the benefit of that concern. He was wholly employed about other matters in which his ability and skill

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were exercised. The evidence in this case is perfectly conclusive that the success of this profitable concern was not owing to Mr. Durand's effort, credit or energy, but it was largely, if not wholly, due to the prudent management, careful attention, excellent judgment and untiring devotion of the plaintiff, who had charge of it. He was, as the proof shows, a gentleman of high character and excellent credit; or in the language of one of the witnesses produced on the part of the defendants, "he was supposed to be a careful, prosperous man, who had been careful and gathered up money for years." It is impossible to deny that he possessed in an eminent degree the confidence of bankers and financial men. Judging from what appears in this record, he is every way the equal of Mr. Durand in financial resources and business capacity. To any and all disparaging remarks made as to his capacity as a financier, or his qualifications as a business man, the plaintiff need only point to the result of ten years' management of this manufacturing business for complete vindication. He commenced operating the mill some time in 1872, and had as we have said, the exclusive charge of the business for ten years. During that period he made large gains so that after the payment of all debts and the capital originally contributed there remains to each partner as net profits an amount nearly double the capital he invested. This money was made when—as it will be remembered by all—the country was suffering from one of the severest commercial crises it has ever passed through—a period of several years when general distrust and loss of credit, corporate and individual, everywhere prevailed; when business enterprise of every kind and on every hand, owing to the depression in trade and financial embarrassment, was wrecked and ruined.

As the plaintiff and Mr. Durand were equal partners, the profits should be divided equally between them. The plaintiff contributed \$2,165.75 more capital than Mr. Durand. We think this should be traced as a loan to the firm, not as capital stock. The plaintiff is entitled to receive this amount, with interest thereon for the time the firm had the use of it. The plaintiff must also be credited with the value of his services in managing the business what they were reasonably worth. The court can ascertain such value by taking further testimony on the question if deemed necessary, and it is desired by the parties.

The account can then be stated on a proper basis, and the assets divided as above indicated.

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BY THE COURT.—The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ORTON, J., dissents.

Motion for a rehearing denied.

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(84 Wis. 159.)

Negotiable instrument — alteration — adding witness.

The affixing of the name of an attesting witness to a promissory note is not a material alteration. (See note, p. 608.)

ACTION on a promissory note. The head-note states the point. The defendant had judgment below.

W. H. Rogers, for appellant.*L. B. Caswell*, for respondent.

TAYLOR, J. After a careful consideration of the authorities and the reasons for holding that alterations of written contracts, after they are executed, destroy such contracts as to parties not assenting to such alterations, we are of the opinion that the instruction excepted to was erroneous and should not have been given.

The old rule of law in England that any alteration, whether material or immaterial, and whether made by a party interested in the contract or by a stranger, rendered the contract void, was long since abandoned; and the reasonable rule has now become firmly established that an alteration of a contract which will render it void must be made by a party thereto or with his knowledge or consent; and further the alteration must be material; that is, the alteration must in some way change the legal effect thereof as between the parties thereto. The insertion or addition of words in or to a contract, or the erasing of words therefrom, which do not change the legal effect thereof in any respect, does not render the contract void, and is an immaterial alteration. *Williams v. Starr*, 5 Wis. 534; *Schwalm v. McIntyre*, 17 Wis. 240; *Matteson v. Ellsworth*, 33 Wis. 488; *North v. Henneberry*, 44 Wis. 306, 319, 320; *Krouskop v.*

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Shontz, 51 Wis. 204, 206; *Palmer v. Largent*, 5 Neb. 223; *Aldous v. Cornwall*, 9 Best & S. 607; *Marson v. Petit*, 1 Camp. 82; *Trapp v. Spearman*, 3 Esp. 56; *Sanderson v. Symonds*, 1 Brod. & B. 426; s. c., 4 Moore, 42; *Catton v. Simpson*, 8 Ad. & El. 136; *Gardner v. Walsh*, 5 El. & Bl. 83; *Truett v. Wainwright*, 4 Gilm. 411; 2 *Parsons Cont.* (6th ed.) 718-720; *Granite R. Co. v. Bacon*, 15 Pick. 239; *Langdon v. Paul*, 20 Vt. 217; *Huntington v. Finch*, 3 Ohio St. 445; *Nichols v. Johnson*, 10 Conn. 192; *Humphreys v. Crane*, 5 Cal. 173.

The affixing of the name of Fredericks as an attesting witness to the note in question does not change the liability of the maker thereof in any respect. It has no effect in extending his liability under the statute of limitations, nor does it under our laws facilitate or interfere in any way with its proof. Under our law the production of the note proves its execution, unless the signature be first denied under oath by the maker. When there is no dispute as to the genuineness of the maker's signature, and therefore no necessity for the person claiming under it making proof of its execution, the fact that the note has or has not an attesting witness is wholly immaterial.

The possibility that the maker of the note and the attesting witness might both die before an action was brought upon it, and in such case the execution of the note might be proved by proving the handwriting of the attesting witness, is too remote and uncertain to be invoked for the purpose of basing a claim that the addition of such attesting witness is a material alteration of the contract. It seems to me the fact that a person who affixes his name as an attesting witness to a contract, when he has not witnessed its execution, cannot even in the matter of proof of the instrument be of any effect under any circumstances; for when it is made to appear that the name was so affixed, or in other words, when the claimed alteration is proved, the party whose name has been affixed as an attesting witness is no longer such witness, and consequently the proof of his handwriting would be no proof of the execution of the contract.

If the alteration be wholly immaterial, and in no way changes the liability of the maker of the note, it seems to us wholly immaterial with what intent such alteration was in fact made. The cases cited by the learned counsel for the respondent from Massachusetts and Maine sustaining the correctness of the instruction,

viz., *Brackett v. Mountfort*, 11 Me. 115; *Thornton v. Appieton*, 29 Me. 298; *Homer v. Wallis*, 11 Mass. 310; and *Smith v. Dunham*, 8 Pick. 246, were all cases where the name of an attesting witness had been added to a promissory note. In those States when a note is attested by a witness, it extends the liability of the maker under the statute of limitations, and so in fact changes to some extent the nature of the contract and enlarges its obligation in the law. In this State there is no such law, and consequently no enlargement of the obligation of the contract by reason of the fact that the note appears to be witnessed. The case of *Adams v. Frye*, 3 Metc. 103, was an action upon a sealed bond. The case of *Marshall v. Gougler*, 10 Serg. & R. 164, was an action on a sealed note. Both cases seem to sustain the contention of the respondent and the correctness of the instruction given by the Circuit Court judge, and may have some weight in those States where the mere production of the note or bond does not prove its execution, and the adding the name of an attesting witness might therefore under some circumstances be an advantage to the holder of the note or bond, and a disadvantage to the maker. Under the laws of this State, we can see no advantage to be gained by placing the name of an attesting witness to a note in favor of the holder of the note, and no disadvantage to the maker, and can conceive of no reason therefore why it should render the note void.

We cannot consider the fact that it is possible that an action might be brought upon this note in a State where the law enlarges the statute of limitations because the note is signed by an attesting witness. We can only judge of the materiality of the claimed alteration of the note by the application of our own laws. If the alteration be immaterial under the laws of this State, it cannot affect the rights of the parties in our courts, because in an action brought upon the note in some other State, the question of the alleged alteration might be adjudged a material alteration under the laws of that State, and possibly a different decision might be had. With that question the court has no concern.

The instructions of the learned Circuit judge upon the second ground of defense were correct.

[Omitting a question of fraud.]

Because the learned Circuit judge misdirected the jury as to the effect of placing the name of Fredericks on the note as an attesting witness, and it is therefore impossible for this court to determine

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whether the verdict of the jury was based upon the ground that the note was void for that reason or because of the fraud in the transaction between the defendant and Rice, the payee of the note, the judgment must be reversed.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

NOTE BY THE REPORTER.—To the same effect, *Hilbery v. Stever*, 75 Me. 69; a. c., 46 Am. Rep. 361.

Where an attestation of the maker's signature was made upon a promissory note before delivery, without the maker's knowledge, but not by the payee, or by his procurement, and there was no fraudulent intent upon the part of the witness, and the note was received and accepted by the payee without any knowledge that it had been attested, and without relying upon the attestation as any part of the contract, *held*, that such an alteration does not make the note void, but being unauthorized, and no part of the contract, as understood or intended by either party, may be stricken out. *Nickerson v. Sweett*, 185 Mass. 514; *Drum v. Drum*, 183 Mass. 566; see *Fay v. Smith*, 1 Allen, 477; *Adams v. Frye*, 3 Metc. 108-106; *Smith v. Dunham*, 8 Pick. 246. Mass. Sup. Jud. Ct., May 8, 1886. *Church v. Fowle*.

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(64 Wis. 173.)

Deed — quit-claim — recording act.

A recorded quit-claim deed takes precedence of a prior unrecorded warranty deed.*

EJECTMENT. The opinion states the case.

J. V. V. Platts, for appellant.

Parks & Thompson, for respondents.

CASSODAY, J. The recorded deed from Morris D. Cutler to Samuel D. James, and the judgment expanding the description therein so as to include the strip of land in question, must together be regarded between the parties to that action, as a completed con-

* *Contra*, *Thorn v. Newsom*, 64 Tex. 161; a. c., 53 Am. Rep. 747.

veyance to him of the nature indicated by the language in the deed. The statute expressly declares that "all judgments, * * * in cases where the title to the land shall have been in controversy, may be recorded in the office of the register of deeds, * * * with like effect as conveyances." Sec. 2236, Rev. Stats. Such judgment having been duly recorded, must have the same effect as the original deed, with the description corrected, re-executed, and re-recorded, would have had. True, the plaintiff herein was not a party to that action. But the statute, in effect, declares that "from the time" of filing notice of *lis pendens* in such action "the pendency of such action shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby; and every purchaser or incumbrancer, whose conveyance or incumbrance is not recorded or filed, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto." Sec. 3187, Rev. Stats. This being so the judgment must relate back to the time of the filing of such notice, and hence, as to such purchasers or incumbrancers, be treated as recorded as of that date. Under that statute, and so far as that action was concerned, the plaintiff must be regarded the same as though he had purchased subsequently to the filing of the notice of *lis pendens* therein, and hence is bound by the proceedings and judgment in that action. *Wright v. Jackson*, 59 Wis. 577; *Coe v. Manseau*, 62 Wis. 89.

Treating the deed as so reformed and re-recorded, even as against the plaintiff, it is still claimed that it was a mere release and quit-claim of any interest which Morris D. Cutler might have had in the land at the time of its execution, and hence ineffectual as against his prior unrecorded warranty deed to the plaintiff. The statute declares, in effect, that "a deed of quit-claim and release of the form in common use," or "of the form" therein given, "shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale." Sec. 2207, Rev. Stats. The form given is simply to the effect that the grantor "hereby quit-claims" to the grantee. And the statute then declares that "such deeds * * * shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns of all right, title, interest and estate of the grantor, either in possession or expectance, in and to the premises therein described, all rights, privileges, and appurtenances thereto belonging." Sec. 2208, Rev. Stats. These two sections in

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terms, as it seems to the writer, elevate a mere "deed of quit-claim and release" into a "deed of bargain and sale." *Russell v. Coffin*, 8 Pick. 143; *Hunt v. Hunt*, 14 Pick. 374; s. c., 25 Am. Dec. 400; *Matthews v. Ward*, 10 Gill & J. 443; *Givan v. Doe*, 7 Blackf. 210; *Hall v. Ashby*, 9 Ohio, 96; s. c., 34 Am. Dec. 424; *Wood v. Chapin*, 13 N. Y. 517; s. c., 67 Am. Dec. 62. Here the grantor, "for and in consideration" of the purchase price paid in and by the deed as reformed, did "give, grant, bargain, sell, remise, release and quit-claim, unto the said" Samuel D. James, "and to his heirs and assigns, forever," the land in dispute, "to have and to hold the same together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said part of the second part, his heirs and assigns forever." The deed itself, especially in connection with the circumstances attending its execution, shows that Morris D. Cutler, in possession and representing himself as the owner of the land, bargained and sold the same for the price named; and in consideration therefor did give, grant and convey the same to Samuel D. James, who relying upon such representations, paid the price and obtained such reformed conveyance. These attending circumstances may properly be considered as showing the real intent and purpose of the instrument. *Taylor v. Harrison*, 47 Tex. 461.

The question is not whether Samuel D. James, by virtue of his deed so reformed and the possession under it, got a better title to the land than the plaintiff had by virtue of his prior unrecorded deed, but whether his deed so reformed, was such as to entitle him to the protection given by section 2241, Rev. Stat. That section provides, in effect, that "every conveyance of real estate within this State * * * which shall not be recorded as provided by law shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall first be recorded." Was the deed to Samuel D. James so reformed a "conveyance" within the meaning of this section? The statute declares, in effect, that "the term 'conveyance,' as used" in that section, "shall be construed to embrace every instrument in writing by which any estate, or interest in real estate, is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except

wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of land." Sec. 2242, Rev. Stats. The deed, so reformed, being an "instrument in writing," and not within any of the exceptions named, must by the very words of the section be embraced in the term "conveyance," as used in section 2241. This view is in harmony with previous utterances of this court, and the decisions of other courts under similar statutes. *Wynn v. Carter*, 20 Wis. 107; *Hoyt v. Jones*, 31 Wis. 396 *et seq.*; *Ehle v. Brown*, 31 Wis. 405; *Helms v. Chadburne*, 45 Wis. 71-74; *Girardin v. Lampe*, 58 Wis. 267; *Wood v. Chapin*, 13 N. Y. 509; s. c., 67 Am. Dec. 62; *Hetzel v. Barber*, 69 N. Y. 1; *Westbrook v. Gleason*, 79 N. Y. 30, 31; *Brown v. Banner Coal Co.*, 97 Ill. 214; *Shotwell v. Harrison*, 22 Mich. 410; *Fox v. Hall*, 74 Mo. 315; s. c., 41 Am. Rep. 316; *Bradbury v. Davis*, 5 Colo. 265; *Frey v. Clifford*, 44 Cal. 335; *Graff v. Middleton*, 43 Cal. 341.

Thus it appears that Samuel D. James purchased subsequently to the plaintiff, and for a valuable consideration paid at the time, and that his deed, as reformed by the judgment, constituted a conveyance which was duly recorded prior to the time when the plaintiff's deed was recorded, within the meaning of section 2241. It also appears that the conveyance to the plaintiff was not recorded until after such completed conveyance to Samuel D. James was recorded. From these things it necessarily follows that the conveyance to the plaintiff must be regarded, under the section of the statute cited, as void against Samuel D. James, provided it appears from the record that he was a "purchaser in good faith," within the meaning of that section. If Samuel D. James so purchased, without any knowledge of the plaintiff's unrecorded deed, or any information sufficient to put him upon inquiry, then in view of the other existing conditions mentioned, he was such "purchaser in good faith" within the meaning of that section. *Mueller v. Brigham*, 53 Wis. 176; *Fallass v. Pierce*, 30 Wis. 468. True there is no direct evidence that Samuel D. James did not know nor have information of the existence of the plaintiff's unrecorded deed, but all inferences from the facts and circumstances in proof are in that direction and none in the opposite direction. These things being so, we think the burden of proving such knowledge or information was upon the plaintiff, if he had any reason to believe it existed. That such burden was on the plaintiff, under the facts and circumstances disclosed in the record, seems to be sanctioned by the au-

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thorities. *Lampe v. Kennedy*, 56 Wis. 254; *Shotwell v. Harrison*, 22 Mich. 411; *Wood v. Chapin*, 13 N. Y. 523; s. c., 67 Am. Dec. 62.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

BY THE COURT.—Judgment affirmed.

Judgment affirmed.

SOLVERSON V. PETERSON.

(64 Wis. 198.)

Libel — actionable words — “swine.”

To call a man a “swine” in writing, is libellous.

LIBEL. The opinion states the case. The plaintiff had judgment below.

Brown & O'Connor, and *A. K. Delaney*, for appellant.

H. K. Butterfield, for respondent.

ORTON, J. The appellant, the defendant in the Circuit Court, interposed a general demurrer to the complaint, which was overruled. The only question on this appeal is whether the alleged publication is libellous. The main facts stated in the complaint are as follows: The libellous article was published by the defendant of and concerning the plaintiff in the *Oconomowoc Local*, a paper published in Waukesha county, and in circulation in the county of Dodge, where the plaintiff resided, and which was read and understood by many persons, and tended to expose the plaintiff to public ridicule, and did so expose him, and it was published by the defendant for the purpose of exposing him to public hatred, contempt, and ridicule. The main charges in said publication are as follows: The plaintiff is spoken of as the “king of the Norwegians, a character so mystical and eccentric that every one would be interested to hear from him.” “He takes us back to the time when the star of human progress was just rising above the dark horizon of human ignorance; when the king of Babylon was changed into an ox and lived on grass.” “But let us doubt such things no longer, when I tell you that at the present time this great king, in

whose veins courses the blood of the ancient viking, has turned into an enormous swine, which lives on lame horses," etc. "He still retains the faculty of speech." "Great sympathy is felt for him by Norwegians all over the world, who keep sending him lame horses. Doctors say there is no hope for his recovery, and he will probably remain a swine the rest of his days."

The plaintiff is here ironically spoken of as a king and a descendant of kings, as if he had assumed such a high character among his countrymen, and he is compared to the king of Babylon, who fell so low as to eat grass in the fields, and he is said to have turned into an enormous swine, living upon the carrion of lame horses, as the public not cognizant of the particular meaning intended by the allusion to "lame horses" may well understand, and he barely retains the faculty of speech, and there is no hope of his recovery, and he will probably always remain a swine. Is not this the most offensive kind of ridicule and most intensely contemptuous, and does it not tend, and was it not intended, to bring the plaintiff into ridicule and contempt, and to injure his standing and reputation as a citizen? How could a man be lower, meaner, or more filthy than to have the character, habits, and ways of a swine. Of course no one would understand that the defendant intended to charge the plaintiff with being veritably a hog. The plaintiff is compared with this low and filthy animal to indicate that he has fallen to the very lowest degree of human degradation, morally, intellectually, and physically. It was supposed that the prodigal had fallen to the very lowest condition when he became the associate of swine, and lived upon the same food. "Words which hold the plaintiff up to contempt, hatred, scorn, or ridicule" are libellous. *Odgers Lib. 21.*

This is the common definition of libel. Is it difficult to see that these words fall within this definition? Words of comparison may be as libellous as those importing a direct charge; such as, "he is thought no more of than a horse-thief and a counterfeiter." *Nelson v. Musgrave*, 10 Mo. 648. "A frozen snake." *Hoare v. Silverlock*, 12 Q. B. 624. "An itchy old toad." *Villers v. Monsley*, 2 Wils. 403. "He is a black sheep." *M'Gregor v. Gregory*, 11 Mees. & W 287. "Likening persons to certain animals," such as imputing to a person their qualities, may be libellous. *Folk. Stark. Sland. 165.* The learned counsel of the appellant claims that the language used in this publication is equivocal or ambiguous. If

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these words mean any thing, they mean to attribute to the plaintiff the meanest of character and conduct. They certainly have not two meanings, one of which may be innocent and the other libellous. They are not ambiguous. It is further claimed that the words are not libellous because their allusions to certain transactions, which give to them a particular meaning, are not understood or explained by innuendo, and hence they have a doubtful meaning, and it is said in the brief of the learned counsel for the appellant, by way of illustration: "A man may be called a swine because he is gluttonous, or because he is grasping or self-seeking, and the court cannot say in which of these senses the word is here used." If this word may be understood to impute either or both of these base qualities to the plaintiff it is sufficient.

Comparing the plaintiff's present character and condition with that of a swine, the publication does not limit the imputation to any particular quality of that animal, and therefore the public may well understand that it was intended to impute to him all of the offensive qualities of a hog, and certainly the article was not intended to give the plaintiff the credit of having any of the good qualities of that animal, if it has any. The obvious meaning of the publication is well expressed by the learned counsel in his brief, even at a close risk of a repetition of the libel, when he says: "It seems most likely therefore that the libellous charge which rankled and festered in the plaintiff's breast for the nine long weary months between the publication of this alleged libel and the commencement of this action was that he, the king of the Norwegians, who had so long enjoyed the confidence and esteem of the community, had become a swine, or to put it as it is more commonly and vigorously put, a hog," *i. e.*, like a hog, as far as a man can possess the offensive characteristics of a hog. A precise precedent of this libel may not be found in the books, but it clearly falls within the rule of all cases in which the libel contained a gross imputation upon the character and conduct of the plaintiff, tending to bring him into ridicule and contempt, and the citation of the thousands of quite similar cases is unnecessary. The sum of all of them is "that language in writing (concerning an individual as such) is actionable *per se*, which denies to a man the possession of some such worthy quality as every man is *a priori* to be taken to possess, or which tends to bring a party into public hatred or disgrace, or to degrade him in society, or to expose him to hatred, contempt, or ridicule,

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or which reflects upon his character or imports something disgraceful to him, or throws contumely on him, or contumely and odium or tends to vilify him or injure his character, or diminish his reputation, or which is injurious to his character, or social character, or shows him to be immoral or ridiculous, or imputes to him a degradation of character," etc. Townsh. Sland. & Lib., § 176.

It is too clear for further argument that this case falls far within these rules. The demurrer was properly overruled.

BY THE COURT. — The order of the Circuit Court is affirmed, and the cause remanded for further proceedings according to law.

WOOD V. BOYNTON.

(64 Wis. 255.)

Fraud — sale — inadequate price.

Where one sold and another bought a diamond worth \$700 for one dollar, the stone being open to the inspection of both, both being ignorant of its real value, and supposing the price a fair one, the sale cannot be rescinded. (*See note, p. 614.*)

ACTION to recover a diamond. The opinion states the case. The defendant had judgment below.

Johnson, Rietbrock & Halsey, for appellant.

N. S. Murphey, for respondent.

TAYLOR, J. This action was brought in the Circuit Court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of \$1,000. The case was tried in the Circuit Court, and after hearing all the evidence in the case, the learned Circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court.

The defendants are partners in the jewelry business. On the trial it appeared that on and before the 28th of December, 1883, the

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plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterward it was ascertained that the stone was a rough diamond, and of the value of about \$700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is in September or October. I went into his store to get a little pin mended, and I had it in a small box,—the pin,—a small ear-ring; * * * this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterward, and about the twenty-eighth of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'one dollar;' and he stepped to the change drawer and gave me the dollar, and I went out."

In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg—worn pointed at one end; it was nearly straw color—a little darker." She also testified that before this action was commenced she tendered the defendants \$1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and be-

fore the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money, with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action.

The only question in the case is whether there was any thing in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone,

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except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterward accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterward ascertained that she made a bad bargain. *Kennedy v. Panama, etc., Mail Co.*, L. R., 2 Q. B. 580.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. *Kennedy v. Panama, etc., Mail Co.*, L. R., 2 Q. B. 587; *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Gurney v. Womersley*, 4 El. & Bl. 133; *Ship's case*, 2 De G., J. & S. 544. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her \$500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or if she had been so told still she knew it was not a diamond. See *Street v. Blay, supra*.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant, that because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made.

When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value,

and so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See *Stettheimer v. Killip*, 75 N. Y. 287; *Etting v. Bank of U. S.*, 11 Wheat. 59.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot therefore be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. The following cases show that in the absence of fraud or warranty the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. *Wheat v. Cross*, 31 Md. 99; s. c., 1 Am. Rep. 28; *Lambert v. Heath*, 15 Mees. & W. 487; *Bryant v. Pember*, 45 Vt. 487; *Kuelkamp v. Hidding*, 31 Wis. 503, 511.

However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

BY THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—This case seems nearly if not quite unique. There is hardly any thing directly in point among the authorities cited by counsel or the court, and we find nothing nearer than those given below. We speak of the exact case of a seller trying to rescind an executed sale, fairly made, on the sole ground of inadequacy of price.

In *Sankey's Exors. v. First Nat. Bk.*, 78 Penn. St. 48, the cashier of a bank bought bonds at par, both cashier and seller supposing that to be their market value, but in fact they were at a premium of six per cent. The seller sued for the premium, but no recovery was allowed. "The mistake or ignorance of the parties in regard to the premium was not of the essence of the contract, or its procuring cause."

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In *Butler v. Haskell*, 4 Dessau. 674, the court below said: "It seems to be generally agreed that mere inadequacy of price is no ground for the court to set aside an agreement, although executory, if it appears to have been fairly entered into and understood, * * * still less is it to be considered as a ground for rescinding a contract already executed; and for as much as the exorbitancy of price has not been held sufficient to discharge a defendant from the performance of his contract, by the same parity of reasoning the complainants shall not be relieved if they have disposed of their property for less than its value." The decision above was put on the ground of the complainant's mental weakness.

In *Osgood v. Franklin*, 2 Johns. Ch. 23, Chancellor KENT said: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression, * * * Though inadequacy of price is not a ground for decreeing an agreement to be delivered up or a sale rescinded (unless its grossness amounts to fraud), yet it may be sufficient for the court to refuse to force performance. It is not an uncommon case for the court to refuse to enforce, for inadequacy, and at the same time refuse to rescind." To the same purport is *Cribbins v. Markwood*, 13 Gratt. 495.

In *Stettheimer v. Killip*, 75 N. Y. 282, the plaintiff sought to set aside an executed purchase by himself of the interest of his copartners in their firm business. The court said: "Under the circumstances existing, it is quite obvious that the plaintiff has made out no case for relief. Courts of equity will sometimes give relief in cases of mutual mistake, where there is a failure of the subject-matter of the sale; but the law does not demand that both parties shall be upon the same footing as to knowledge or information. It requires that each one should be vigilant, and should abstain from stating any fact tending to mislead or deceive the other. If the parties stand upon a footing of equality and no fraud is committed by either, each must abide by the contract, and each is entitled to the benefit of his own sagacity. *Pidcock v. Bishop*, 3 B. & Cress. 605; *Elting v. Bank of U. S.*, 11 Wheat. 59, and cases cited. There is no pretense of fraud in this case. Each of the parties had ample and full opportunity and an equal advantage in ascertaining the actual state of the accounts, and no deceit was practiced. The plaintiff had a right to reject the proposal made, and in accepting it, he acquired no right to compel the defendants to account, if it turned out that he paid too much. It is difficult to see how the object of the plaintiff's action could be accomplished by an accounting, or on what basis it can properly and lawfully be conducted. What relief can the plaintiff have? Clearly the defendants could not be compelled to pay back, on the basis of the plaintiff's first statement. They expressly refused to sell upon any such statement, proposed another and a different one, which was accepted, and equity could not compel them now to accept what they had expressly rejected and refused to accede to. No other theory is suggested upon which the defendants can be made liable; and none exists either at law or in equity. In view of the facts, it is not apparent upon what equitable principle the plaintiff is entitled to relief; and if he ignorantly or negligently made a bad bargain the law furnishes no remedy."

Gelzenleuchter v. Niemeyer.

GELZENLEUCHTER V. NIEMEYER.

(64 Wis. 316.)

False imprisonment — void warrant.

In an action for false imprisonment, a warrant void on its face is no defense to one on whose complaint the warrant was issued.

ACTION of false imprisonment. The opinion states the case. The defendant had judgment below.

J. C. McKenney & J. J. Sutton, for appellant.

Geo. W. Stephens & P. G. Stroud, for respondent.

CASSODAY, J. The attempt was made, as it is claimed, to prosecute the plaintiff for the violation of section 4398, R. S. It is not claimed that the plea of not guilty and adjournment before the justice was any waiver of the question of jurisdiction. It clearly was not within the rule stated in *Steuer v. State*, 59 Wis. 472. The learned counsel for the defendant frankly concedes that the complaint made by the defendant before the justice charges no offense whatever, and that the warrant issued thereon, reciting the complaint, charges no offense whatever; and hence that the warrant is absolutely void upon its face, especially within the rule announced by this court in *Steuer v. State*, *supra*. With equal frankness the same counsel also concedes that the evidence in the record tends to show that the defendant maliciously made the complaint, and that he received the warrant from the justice, delivered it to his attorney, who delivered it to the officer for the purpose of having the plaintiff arrested thereon; and that the plaintiff was arrested and imprisoned thereon for the space of three hours. The counsel for the defendant also concedes that had the defendant caused the plaintiff to be arrested upon a void process in a civil action, then he would have been liable therefor in an action for false imprisonment, as this clearly is, even though he acted in good faith. But counsel ingeniously contends that "an action for false imprisonment cannot be maintained against a party who makes, or attempts to make, a criminal complaint to a magistrate, upon which the magistrate causes an arrest by issuing his warrant, whether the facts stated

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constitute an offense or not." In support of this contention he cites several authorities, English and American.

A careful reading of these cases discloses the fact that they are all distinguishable. In *Beaty v. Perkins*, 6 Wend. 382, both the warrant and the complaint upon which it was issued seem to have charged an offense, and of course it was held that the party making the complaint was not liable in trespass. In *Stewart v. Hawley*, 21 Wend. 552, the constable who made the arrest was the party who made the complaint to the justice, and it was held that an action of trespass or false imprisonment could not be maintained against him or the justice, and this was put on the ground that the recitals in the complaint and warrant presented "a case within the jurisdiction of the justice, and which called for the exercise of his judicial functions, and if so though they may have erred, he is not liable." Page 556. Chief Justice NELSON said: "I cannot agree with the plaintiff that the facts are so barren as not to lay the foundation for jurisdiction, or that the decision was so gross as to afford evidence *per se* of the influence of bad motives." In *Von Latham v. Libby*, 38 Barb. 345, the opinion of the court expressly states that "the only connection of the defendants with the arrest or detention of the plaintiff * * * is that they stated their case to the magistrate, charging the plaintiff with a misdemeanor upon the facts which they swore to, and asked for his arrest;" and for that reason it was held that they were not liable for false imprisonment. Several of the other cases relied upon by counsel are to the same effect, as in *Murphy v. Walters*, 34 Mich. 180; *Grinham v. Willey*, 4 Hurl. & N. 496; *Barber v. Rollinson*, 1 Cromp. & M. 330; *Carratt v. Morley*, 1 Q. B. 18; *West v. Smallwood*, 3 Mees. & W. 418. The true distinction is sharply made in the last two cases cited. In *West v. Smallwood* the warrant of arrest was without jurisdiction, and it held that a party merely making a complaint before a magistrate on a subject over which he has general jurisdiction is not liable to false imprisonment; but it was held that the fact that the complainant accompanied the constable charged with the execution of the warrant "was evidence to go to the jury of a participation in the arrest." In *Carratt v. Morley* the former was arrested on a warrant issued on a judgment by default, in a civil action in favor of the latter, but Morley in no way participated in making the arrest. Carratt then brought an action of trespass for false imprisonment against Morley, the six commissioners who ordered the warrant to be issued by

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their clerk, and the officer making the arrest. The commissioners were without jurisdiction. Lord ABINGER thought that Morley was "not liable, inasmuch as he had only stated his case to the commissioners, who proceeded to adjudge upon it," but was in doubt as to the commissioners and the officer, and "leave was therefore reserved to move for a nonsuit generally, and on the other hand for a verdict against all the defendants except" Morley. The Court of Queen's Bench, per Lord DENMAN, C. J., held that they were all liable except Morley.

Such are the authorities upon which we are asked to sustain the nonsuit. It will be observed that none of the cases cited go to the extent of holding that a warrant void upon its face is a defense in an action of false imprisonment for one who participated in making the arrest. On the contrary, two of the cases squarely hold that such void warrant is no protection to such a person in such an action. Had the defendant done nothing more than to have sworn to the complaint before the justice, he would not under these authorities have been liable in this action. But here there is some evidence tending to prove that after the warrant was issued the defendant did not participate in making the arrest. The distinction between false imprisonment and malicious prosecution was indicated in *Murphy v. Martin*, 58 Wis. 279. In that case it was held that the fact that the warrant upon which the arrest was made was void on its face was not available to the plaintiff in an action for malicious prosecution, but only in an action for false imprisonment. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. *Murphy v. Martin*. 58 Wis. 279; *Elsee v. Smith*, 2 Chit. 304, *Nebenzahl v. Townsend*, 10 Daly, 236; *Brown v. Chadsey*, 39 Barb. 260-263. In such an action the imprisonment cannot be false, for it is upon lawful process, and hence by lawful authority. False imprisonment, on the other hand, is a trespass committed against a person by unlawfully arresting and imprisoning him without any legal authority. *Ib.*; 2 Add. Torts, 798; *Burden v. Alloway*, 11 Mod. 180; *Burns v. Erben*, 40 N. Y. 463; *Lock v. Ashton*, 12 Q. B. 871. Thus the arrest of the right person by the wrong name, through a misnomer in the process, without an allegation that the true name is unknown, is false imprisonment. *Hoye v. Bush*, 1 Man. & G. 775; *Scheer v. Keown*, 29 Wis. 586. Where in an action for false im-

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prisoment the arrest and detention is admitted, and the only justification relied upon by a defendant having participated therein is that such arrest and detention were under a warrant issued by a magistrate, it must appear, in order to be available, that such warrant was valid upon its face. *West v. Smallwood*, 3 Mees. & W. 418; *Carratt v. Morley*, 1 Q. B. 18; *Grumon v. Raymond*, 1 Conn. 40; s. c., 6 Am. Dec. 200; *Poult v. Slocum*, 3 Blackf. 421; *Vaughn v. Congdon*, 56 Vt. 111; *Hoye v. Bush*, 1 Man. & G. 775; *Blyth v. Tompkins*, 2 Abb. Pr. 468; *Flack v. Harrington*, 12 Am. Dec. 170; *Gold v. Bissell*, 1 Wend. 210; s. c., 19 Am. Dec. 480; *Floyd v. State*, 54 Am. Dec. 250; *Mitchell v. State*, 54 Am. Dec. 253, and notes to the cases; *Smith v. Shaw*, 12 Johns. 257; *Miller v. Adams*, 52 N. Y. 409; *Abbott v. Booth*, 51 Barb. 546; *Harwood v. Siphers*, 70 Me. 464; *Gorton v. Frizzell*, 20 Ill. 291; *Sheldon v. Hill*, 33 Mich. 171; *Green v. Elgie*, 5 Q. B. 99. There must not only be a jurisdiction of the subject-matter, but also a jurisdiction of the process. *Grumon v. Raymond*, *supra*; *Vaughn v. Congdon*, *supra*. A warrant absolutely void upon its face, as the one before us is conceded to be, is necessarily a nullity,—mere waste paper—and hence in an action of false imprisonment can afford no protection to one participating in making an arrest under it.

The evidence tending to show that the defendant participated in making the arrest after the warrant was issued is weak, but we think it was sufficient to take the case to the jury.

BY THE COURT.—The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Judgment reversed.

GILL v. BENJAMIN.

(64 Wis. 302.)

Sale — successive deliveries — several contract.

G. agreed to sell to B. 1,000 cords of wood “to be delivered from G.’s pier in [in Michigan] over the rail of the vessel * * * and to be delivered from time to time to B.’s vessel as wanted during the season of navigation; said wood to be piled as taken from vessel, and to be measured and paid for when piled on B.’s dock in Milwaukee.” One cargo of the wood was thus delivered on the vessel, and lost with the vessel. *Held*, that the contract as to

such cargo became an executed sale, and the title vested at once in B., and the piling and measurement having been rendered impossible, either by B.'s fault or by the act of God, B. was liable for the cargo. (*See note, p. 624.*)

ACTION for price of wood sold. The head-note states the case. The plaintiff had judgment below.

Markham & Noyes, for appellant.

J. E. Wildish, for respondents.

CASSODAY, J. The facts are undisputed. Does the law put the loss of the 155 cords of wood upon the plaintiffs or the defendant? The contract when made was executory. The plaintiffs thereby agreed to sell and deliver to the defendant 1,000 cords of wood. The wood was to be the kind and quality named in the contract. No particular 1,000 cords of wood was then designated nor described therein. It was all "to be delivered from Gill's pier * * * over the rail of the vessel." It was moreover "to be delivered from time to time" at that place, "as wanted, during the season of navigation of 1884." The *Bailey* was chartered by the captain of the defendant's vessel, and for the purpose of the contract must be regarded the same as though it were the property of the defendant. True, each cargo was "to be piled on the defendant's dock in Milwaukee" as taken from the vessel, and to be measured and paid for at the price named when so piled. This raises the question whether, by the terms of the agreement, the title of each cargo became vested in the defendant when delivered to and "over the rail of the defendant's vessel at Gill's pier or remain vested in the plaintiffs while being carried across the lake on the defendant's vessel, and until taken from his vessel and piled on his dock in Milwaukee. If the title to each cargo remained vested in the plaintiffs until piled on the defendant's dock in Milwaukee, then did it continue to be vested in them until measured? and if until measured, then did it remain vested in them until paid for? The piling on the dock was apparently to facilitate the measurement, and the measurement was apparently to ascertain the amount to be paid. But can it be that the title of a cargo so piled upon the defendant's dock and measured did not become vested in the defendant until he had paid for it? And if it became vested in him before he paid for it, then why not before it was measured or piled on his dock or taken from his vessel.

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The words "sell and deliver to you * * * from Gill's pier, * * * over the rail of the vessel," clearly designated that as the place of delivery. On the delivery of any cargo being made in that way in that place, the possession of such cargo was manifestly intended by the contract to immediately pass entirely from and beyond the control of the plaintiffs into the absolute and exclusive possession and control of the defendant. The vessel upon which such cargo was so placed belonged to the defendant, and was controlled by his captain; or else the vessel was chartered by his captain for his service in the transportation of such cargo, and hence was, so far as the contract was concerned, his vessel for that voyage for the purposes of such transportation. The plaintiffs had no control over the management of the vessel, nor the direction in which it should go, nor the port at which it should land. The contract, though executory when made, yet as it contemplated a delivery from time to time, as wanted, in separate cargoes, each of which was to be paid for as indicated, it was clearly severable. *Scott v. Kittanning Coal Co.*, 89 Penn. St. 231; s. c., 33 Am. Rep. 753; *Goodwin v. Merrill*, 13 Wis. 737; *Sawyer v. C. & N. W. R. Co.*, 22 Wis. 385. This being so it necessarily follows that as each cargo was delivered on board the defendant's vessel, the contract as to such cargo became an executed sale, so far as the plaintiffs were concerned, unless the mere fact that their man was expected to participate in the measurement of such cargo when piled on the defendant's dock prevented the title to such cargo from becoming vested in the defendant until so measured. *Morrow v. Reed*, 30 Wis. 81; *Morrow v. Campbell*, 30 Wis. 90; *Fletcher v. Ingram*, 46 Wis. 191; *Scott v. Kittanning Coal Co.*, *supra*.

Such being the wording and effect of the contract, we must hold that each cargo, on being delivered "over the rail of the vessel" sent for that purpose by the defendant or his captain, became at once the property of the defendant, unless the stipulation for piling and measuring on the defendant's dock, before payment, prevented the title from so vesting in him. Of course the 155 cords, being lost, was not so piled on the defendant's dock in Milwaukee, nor measured; and therefore it is claimed there is no obligation to pay. The contract contemplates no such loss. It contains no stipulation as to any one taking the risks of the perils of the lake. Without such stipulation, such risk would necessarily fall upon the owner of the cargo at the time of loss. It will be observed that the con-

tract contains no stipulation for any inspection or sorting of the wood on the defendant's dock. The wood was to be taken from the vessel, piled and measured on the dock; but it is silent as to who should do the piling or the measuring. It seems to be conceded that the defendant was to do the piling. It may be inferable that the plaintiff's man was expected to witness or participate in the measurement of every cargo, as he did of each that was so piled on the dock. Was such piling and measuring a condition precedent to the vesting of the title thereof in the defendant? Where the manifest intention of the parties is to transfer the title, the sale may be complete, notwithstanding the property is yet to be measured, and the amount of the price yet to be ascertained. *Sewell v. Eaton*, 6 Wis. 490; *McConnell v. Hughes*, 29 Wis. 537; *Morrow v. Campbell*, 30 Wis. 90; *Fletcher v. Ingram*, 46 Wis. 191. So held where by the agreement the vendee was to have the title to saw-logs as soon as the vendor deposited them in a certain place. *Morrow v. Reed*, 30 Wis. 81. These principles are fully recognized and sanctioned in *Pike v. Vaughn*, 39 Wis. 505, relied upon by counsel for the defendant. Thus in *Dixon v. Baldwin*, 5 East, 175, A. & B., traders in London, ordered goods from the defendants at Manchester to be sent to M. & Co., at Hull, for the purpose of being afterward sent to the correspondents of A. & B., at Hamburg, and the defendants sent the goods to M. & Co. at Hull to be shipped by them to Hamburg, as usual, pursuant to the order; and it was held, as between the buyer and seller, the right of the defendants to stop as in *transitu* was at an end when the goods came to the possession of M. & Co. at Hull; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees. To the same effect, *Kendal v. Stevens*, 11 Q. B. Div. 356; *Ex parte Miles*, 15 Q. B. Div. 39.

We must hold that the intention of the parties, as expressed in the contract, was that the title to each cargo should immediately vest in the defendant on being placed on board of the defendant's vessel at Gill's pier. True, the contract provides, in effect, that each cargo was to be "paid for when piled on" the defendant's dock in Milwaukee, and that the cargo of 155 cords was never so piled on that dock. But the undisputed evidence shows that the failure to so pile on the defendant's dock was in no way attributa-

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ble to the plaintiffs. It may be conceded also that it was not the fault of the defendant nor his agents, although the cargo was in the exclusive possession of the defendant at the time it was lost. Assuming that the loss of the cargo was not the fault of the defendant's agents, then such piling on the defendant's dock was rendered impossible solely by the act of God, and hence the defendant, upon its loss, thereupon became liable for its value. *Powers v. Dellinger*, 54 Wis. 389; *Nugent v. Smith*, 1 C. P. Div. 423; 2 Benj. Sales, § 861.

It appears from the undisputed evidence that the 155 cords of wood lost was of the kind and substantially of the quality called for in the contract, and the same as the other wood which had been received by the defendant without any objection, although a deduction was made in the price of twenty-six cords called culls. The title to the 155 cords of wood having become vested in the defendant when the same was placed on board of the Bailey, and the captain of the Bailey being in law the agent of the defendant for the purpose of receiving the wood, and having received the same on board the Bailey without any objection as to quality, and the wood having been lost, as indicated, it may be very doubtful whether any damages could be recovered in this action, even had there been a counterclaim for such damages in the answer. *Locke v. Williamson*, 40 Wis. 377. But here there was no such counterclaim, and hence the question need not be determined. The defendant does claim damages by way of counterclaim however for the failure to deliver the balance of the 1,000 cords called for by the contract, including the 155 lost. But the contract only required that the plaintiffs should deliver the wood at their pier to the defendant's vessel from time to time, "as wanted, during the season of navigation of 1884." There is no evidence of any failure to deliver any wood "as wanted" by the defendant during that season, nor of any unreasonable delay in furnishing wood to any vessel calling for it at the plaintiff's pier in behalf of the defendant. We discover no ground upon which the defendant is entitled to any damages under his counterclaim. *Simpson v. Crippin*, L. R., 8 Q. B. 14; *Higgins v. D., L. & W. R. Co.*, 60 N. Y. 553; *Scott v. Kittinging Coal Co.*, 89 Penn. St. 231; s. c., 33 Am. Rep. 753; *Haines v. Tucker*, 50 N. H. 307.

BY THE COURT.—The judgment of the County Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—Whether a contract is separate or entire depends upon the entirety of the consideration, or its express or implied apportionment to the several items constituting the subject, not upon the singleness of its subjects or the multiplicity of the items composing it. Defendant's witnesses, in an action for breach of contract, testified that he sold the plaintiff six car-loads of corn deliverable at different times for a price per bushel payable by sight drafts, and there was no evidence of an agreement that the whole price of all the cars was to be paid after final delivery. *Held*, that it was error for the court to charge, that if the defendant's testimony was believed the contract was entire, and the defendant was bound to deliver all the corn before demanding payment. *King Philip Mills v. Slater*, 12 R. I. 82; s. c., 84 Am. Rep. 186. The defendant delivered one car-load, which was accepted by the plaintiff, and the sight draft therefor paid, but he refused to pay the draft accompanying the second car-load, whereupon the defendant stopped further shipments and plaintiff claimed damages resulting from such refusal. The court charged the jury if they found from the whole evidence that there was a contract made by defendant with plaintiff for the sale to the latter of six cars of corn to be delivered at different times, and the consideration was to be paid on each item or car-load, the contract was severable, and refusal to honor one draft would not rescind it and plaintiff could recover for the breach in refusing to deliver the rest. *Held*, that this instruction was also erroneous. The jury should have been told that it was the contract of the parties that the corn was to be paid for at each delivery, whether one car or more, and the plaintiff having refused to pay for a delivery which had been accepted by him, without any sufficient reason for such refusal, he thereby authorized the defendant to rescind, and if he did so within a reasonable time, the contract was at an end. *Rugg v. Moore*, Penn. Sup. Ct., Oct. 5, 1885. See *Burrows v. Whitaker*, 71 N. Y. 291; s. c., 27 Am. Rep. 42; *Blackburn v. O'Reilly*, 47 N. J. 290, *ante*.

In *Norrington v. Wright*, 115 U. S. 188, a contract was made in Philadelphia for the sale of "five thousand tons iron rails, for shipment from a European port or ports, at the rate of about one thousand tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at \$45 per ton of two thousand two hundred and forty pounds, custom-house weight, *ex ship* Philadelphia; settlement, cash on presentation of bills accompanied by custom-house certificate of weight; sellers not to be compelled to replace any parcel lost after shipment." *Held*, that the sellers were bound to ship one thousand tons in each month, from February to June, inclusive, except that slight and unimportant deficiencies might be made up in July; and if only four hundred tons were shipped in February, and eight hundred and eighty-five tons in March, and the buyer accepted and paid for the February shipment on its arrival in March, at the stipulated price and above its market value, and in ignorance that no more has been shipped in February, and was first informed of that fact after the arrival of the March shipments, and before accepting or paying for either of them, he might rescind the contract by reason of the failure to ship about one thousand tons in each of the months of February and March.

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GRAY, J., said: "In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which the term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract, *Behn v. Burness*, 3 Best & S. 751; *Bowes v. Shand*, 2 App. Cas. 445; *Lumber v. Bangs*, 2 Wall. 738; *Davison v. Von Lingen*, 118 U. S. 40.

"The contract sued on is a single contract for the sale and purchase of five thousand tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. *Mersey S. & I. Co. v. Naylor*, 9 App. Cas. 484, 489. The further provision that the seller shall not be compelled to replace any parcel lost after the shipment, simply reduces in the event of such a loss, the quantity to be delivered and paid for. The times of shipment as designated in the contract, are 'at the rate of about one thousand tons per month, beginning February, 1880, but the whole contract to be shipped before August 1, 1880.' These words are not satisfied by shipping one-sixth part of the five thousand tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about one thousand tons to be shipped in each of the five months from February to June, inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances — such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer in a certain mill — in which case the mention of the quantity, accompanied by the qualification of 'about,' or 'more or less,' is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: 'When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.' *Brawley v. United States*, 96 U. S. 168, 171, 172. The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

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"The plaintiff instead of shipping about one thousand tons in February and about one thousand tons in March, as stipulated in the contract, shipped only four hundred tons in February and eight hundred and eighty-five tons in March. His failure to fulfill the contract on his part in respect to these two first installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for clearly and positively the right to rescind if the law entitled them to do so. Their previous acceptance of the single cargo of four hundred tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance is placed on that omission in the correspondence between the parties.

"The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract. The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and having failed to do so, cannot maintain this action.

"For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

"In the leading case of *Hoare v. Rennie*, 5 Hurl. & N. 19, which was an action upon a contract of sale of six hundred and sixty-seven tons of bar-iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterward offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiff that they would not accept the rest. The defendants pleaded that the shipment in June was of twenty tons only, and that the plaintiffs failed to complete the shipment for that month according to contract. Upon demurrer to the pleas it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron POLLOCK saying: 'The defendants refused to accept the first shipment, be-

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cause, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one-fourth shall be shipped in each month, and we cannot say that they meant any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract—they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action. 5 Hurl. & N. 28. So in *Coddington v. Paleologo*, L. R., 3 Exch. 198, while there was a division of opinion upon the question whether a contract to supply goods, 'delivering on April seventeenth, complete eighth May,' bound the seller to begin delivering on April seventeenth, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

" On the other hand, in *Simpson v. Crippin*, L. R., 3 Q. B. 14, under a contract to supply from six thousand to eight thousand tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only one hundred and fifty tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages.

" And in *Brandt v. Lawrence*, 1 Q. B. Div. 844, in which the contract was for the purchase of 4,500 quarters, ten per cent. more or less, of Russian oats, 'shipment by steamer or steamers during February,' or in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,189 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,189 quarters, and was liable to an action by the seller for refusing to accept them. Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand*, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. Div. 470; 2 Q. B. Div. 112; 2 App. Cas. 455. In that case two contracts were made in London, each for the sale of 800 tons of 'Madras rice, to be shipped at Madras or coast for this port during the months of March and (or) April, 1874, per Rajah of Cochin.' The 600 tons filled 8,200 bags, of which 7,120 bags were put on board, and bills of lading signed in February, and for the rest, consisting of 1,080 bags put on board in February, and fifty in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract as apparent upon its face was that all the rice must be put on board in March and April, or in one of those months. In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

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“ Lord Chancellor CAIRNS said: ‘ It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears on the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.’ 2 App. Cas. 463. ‘ If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning — it is no observation which can dispose of, or get rid of, or displace that literal meaning — to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices had dropped; but that is no reason why a term which is found in a contract should not be fulfilled.’ Pages 465, 466. ‘ It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said that it bears, that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 800 tons of rice in gross or in general. It is 800 tons of Madras rice, to be put on board at Madras during the particular months.’ ‘ The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract.’ Pages 467, 468.

“ Lord BLACKBURN said: ‘ If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take any thing in fulfillment of that contract it must be shown, not merely that it is equally good, but that it

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is the same article as they have bargained for, otherwise they are not bound to take it.' 2 App. Cas. 480, 481.

" Soon after that decision of the House of Lords two cases were determined in the Court of Appeal. In *Reuter v. Sala*, 4 C. P. Div. 289, under a contract for the sale of 'about twenty-five tons, more or less, black pepper, October and (or) November shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing, within sixty days from date of bill of lading,' the seller, within the sixty days, declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November and five tons in December, and it was held that the buyer had the right to refuse to receive any part of the pepper.

" In *Honck v. Muller*, 7 Q. B. Div. 92, under a contract for the sale of 2,000 tons of pig iron, to be delivered to the buyer free on board the maker's wharf 'in November, or equally over November, December and January next,' the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January, and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract was cancelled by the buyer's not taking any iron in November.

" The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co. v. Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeal in 9 Q. B. Div. 648, and following the decision of the Court of Common Pleas in *Freeth v. Burr*, L. R., 9 C. P. 208. But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstance evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor SELBORNE in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver the first installment. The lord chancellor said: 'The contract is for the purchase of 5,000 steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract as to the time of delivery — 'delivery 1,000 tons monthly, commencing January next' — and as to the time of payment — 'payment net cash within three days after receipt of shipping documents' — but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment, and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel.' 9 App. Cas. 439.

“ Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie* and *Honck v. Muller*, above cited, yet in the House of Lords *Simpson v. Crippin* was not even referred to, and Lord BLACKBURN, who had given the leading opinion in that case, as well as Lord BRAMWELL, who had delivered the leading opinion in *Honck v. Muller*, distinguished *Hoare v. Rennie* and *Honck v. Muller* from the case in judgment. 9 App. Cas. 444, 445.

“ Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala* and *Honck v. Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes v. Shand*, while it in no wise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*. In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill v. Blake*, 97 N. Y. 216, which accords with *Bowes v. Shand*, and *King Philip Mills v. Slater*, 12 R. I. 82; s. c., 34 Am. Rep. 603, which approves and follows *Hoare v. Rennie*. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion.

“ In *Shinn v. Bodine*, 60 Penn. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, ‘ coal to be delivered on board vessels as sent for during the months of August and September,’ was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time.

“ In *Morgan v. McKee*, 77 Penn. St. 228, and in *Scott v. Kittanning Coal Co.*, 89 Penn. St. 231; s. c., 33 Am. Rep. 753, the buyer’s right to rescind the whole contract upon the failure of the seller to deliver one installment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous installment of the goods. The decision of the Supreme Judicial Court of Massachusetts in *Winchester v. Newton*, 2 Allen, 492, resembles that of the House of Lords in *Mersey Co. v. Naylor*.

“ Being of opinion that the plaintiff’s failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Bust v. Spence*, 4 Camp. 829; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, above cited.”

Noyes v. Northwestern National Insurance Company.

NOYES V. NORTHWESTERN NATIONAL INSURANCE COMPANY.

(84 Wis. 415.)

Insurance — "contained in" — wearing apparel.

A seal-skin garment insured against fire by a policy describing it as "contained in" a dwelling-house, was burned while at a furrier's shop for repairs. *Held*, that the insurer was liable, although the risk was greater at the shop than at the house.*

ACTION on a fire insurance policy. The head-note shows the case. The plaintiff had judgment below.

Jenkins, Winkler & Smith, and C. H. Van Alstine, for appellant.

Markham & Noyes, for respondent.

LYON, J. The decision of this case turns entirely upon the effect of the words "contained in," as used in the policy to specify the location of the insured property. In a policy upon personal property, which from its character and ordinary use is kept continuously in one place, as a stock of merchandise, machinery in a building, household furniture or goods stored, the rule undoubtedly is that the location of the property designated in the policy is an essential element of the risk, and usually a continuing warranty. In such a case the policy covers the goods only so long as they remain in the designated place; and if they are destroyed elsewhere, the insurer is not liable for the loss.

It is maintained by the plaintiff that the rule is not applicable to a case where the insured property is of such a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, and such use may be presumed to have been in contemplation of the parties when they made the contract of insurance. It is also claimed that in such a case the location of the property is specified in the policy merely to designate the accustomed place of deposit when the property is not absent therefrom in the course of its ordinary use; and if the property be burned when so absent (the place of deposit remaining unchanged), the insurer is liable for the loss.

* See *English v. Franklin F. Ins. Co.*, *ante*.

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This is such a case. The dolman was a garment for out-door wear, and necessarily would be chiefly used away from the designated dwelling-house. It would or might be necessary from time to time to send it to a furrier for repairs; and it was liable to be burned when so absent from the place of deposit. It must be presumed that the parties entered into the contract of insurance in contemplation of these incidents, for they are matters of common knowledge.

Under these circumstances, we think the rule contended for by the plaintiff is eminently reasonable and just when applied to this case. It is abundantly sustained by the adjudications of courts of high authority, supported by arguments which are entirely satisfactory to us. We can only refer briefly to some of the cases.

In *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494, the policy insured, with other property, "seven horses, * * * situated section 22," etc. The policy (like the one in suit) contained the usual stipulation that if the risk should be increased by any means, without the assent of the insurer, the policy should become void: The assured, a farmer, while hauling his grain to market with two of the horses, put up for the night at a hotel, distant from section 22. During the night the hotel barn in which the horses were stabled was destroyed by fire, and one of the insured horses was burned to death. Held, that the risk was not limited to the use of the horses on section 22, but extended to the usual and ordinary use of them elsewhere, and that the company was liable for the loss of the horse.

Mills v. Farmers' Ins. Co., 37 Iowa, 400, was a policy insuring "live-stock on premises situated sec. 7, 76, 27." A horse owned by the insured, and usually kept on the designated premises, was killed by lightning at a place six miles distant from such premises, when the owner was driving him to mill. Held, that the insurer was liable.

In *McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 349; s. c., 22 Am. Rep. 249, the policy covered a phaeton "contained in a frame barn," and the vehicle was destroyed by fire while at a carriage shop undergoing repairs, and where it was subject to an increased risk. The insurance company was held liable for the loss.

In *Longueville v. Western Assurance Co.*, 51 Iowa, 553; s. c., 33 Am. Rep. 146, the policy covered "family wearing apparel contained in two story frame dwelling on lot 6," etc. While riding in

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a sleigh along a street certain wearing apparel of the assured was burned. Held, the loss was recoverable under the policy.

In *Everett v. Continental Ins. Co.*, 21 Minn. 76, the property insured was a threshing-machine "stored in barn on sec. 36, T. 23, R. 28, owned and insured by L. L. Chaffin." The machine was burned when standing in a field on that section. The company was held liable. Judge BERRY, delivering the opinion of the court, said: "But whatever might have been the purpose of the location of the machine in the application and policy, there is no ground whatever for contending that it was, in letter or in spirit, a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that this location should remain unchanged, or if changed, that while changed the insurance should cease or be suspended. *Smith v. Mechanics' & Traders' Ins. Co.*, 32 N. Y. 399, and cases cited; *Blood v. Howard Fire Ins. Co.*, 12 Cush. 472; *Fland. Ins.* 241, 255, 269, 485."

Holbrook v. St. Paul F. & M. Ins. Co., 25 Minn. 229, is a case in which mules were insured as being all contained in a certain barn. For the purpose of plowing, and also of repairing such barn, they were removed to another barn on another section, where the loss occurred. The company was held liable under the policy for the loss. There is a valuable note to this case by the editor of the *Insurance Law Journal* (8 Ins. Law J. 793), in which many cases bearing upon this question are cited and commented upon. *London & Lancashire Fire Ins. Co. v. Graves* (Superior Court, Ky.), 13 Ins. Law J. 308, is very closely in point. Buggies were insured as "contained in" a certain livery-stable. They were burned while in a carriage factory for repairs. Held, that the absence of the buggies from the designated place of deposit for repairs was an incident of their use and permitted by the policy, and that the insurer was liable.

The same doctrine is recognized by the Supreme Court of Rhode Island in *Lyons v. Providence Washington Ins. Co.*, 13 R. I. 347; s. c., 43 Am. Rep. 32; but in that case there was a permanent removal of the insured property from the place designated in the policy, and for that reason the insurer was relieved from liability.

The question we are considering is now first presented to this court. It is doubtless true that there is conflict in the cases in which it has been considered. It is our duty to choose between these conflicting lines of adjudication, and to adopt the doctrine

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which best commends itself to our judgment. We discharge this duty when we hold (as we do) that the words in the policy, "contained in the two-story frame dwelling-house," etc., when applied to the dolman in question, do not constitute a continuing warranty that the same shall always be kept in such dwelling, which would relieve the insurer from liability should it be burned elsewhere; but they are only a warranty that the place designated shall be the usual place of deposit when the dolman should not be in customary use elsewhere, and if burned when in such use it is still covered by the policy, and the insurer is liable. Also that it was a reasonable and proper use of the dolman to send it to the furrier for repairs, and it is immaterial that the risk of loss was greater in the furrier's store than in the dwelling-house designated in the policy. The learned County judge so held, and the judgment is in strict accord with his conclusions of law.

By THE COURT.—Judgment affirmed.

LAWSON V. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

(84 Wis. 447.)

Carrier — of passengers — railroad — negligence — person riding free with stock.

The owner of horses shipped them for transportation on the defendant railroad. By oral agreement with the defendant's station agent one person was to be allowed to ride free in the car with them to take care of them, and the plaintiff's intestate so rode to the knowledge of the conductor. While so riding he was killed by the gross negligence of the defendant, but owing to his position in the car. It was the custom of the defendant to allow one person to ride free in the car with stock to take care of it, and to exact a written contract from the owner waiving certain liabilities and conditioned that the person so riding should assume his own risk of personal injury, and to require such person to indorse the contract. In this case, after the accident and before the plaintiff's death, the owner and the agent executed such a contract and signed the name of the plaintiff's intestate on the back. *Held*, that the company was liable in damages.

ACTION of damages for death by negligence. The head-note states the case. The plaintiff had judgment below.

Lawson v. Chicago, St. Paul, Minn. and Omaha Railway Company.

S. L. Perrin, John D. Howe and Clapp & Macarthey, for appellant.

R. H. Start and L. P. Wetherby, for respondent.

ORTON, J. One W. E. Fay, in the night-time of the 12th of December, 1883, shipped on one of the freight cars of the appellant company, at New Richmond, twelve horses to be carried to Phipps station, a distance of about 100 miles, and employed the deceased to ride in said car to care for said horses on the route. About twenty-five miles from New Richmond at a station called Clayton, the train in which said car was placed met and collided with another train standing there at the time, and thereby the car in which the horses and the deceased were being carried was crushed in and broken, and the deceased so injured as to cause his death.

It is admitted in the answer that the collision which caused such death resulted from the fault of the servants of the company, and the jury found that the collision which caused it was occasioned by their gross negligence. It is alleged in the complaint that the said Fay entered into a contract with the company that said horses should be so transported for the usual charges, which were paid, and that it was agreed that John J. Lawson, the deceased, the employee of said Fay, should accompany said horses, and ride with them on said car, to look after their interests. It is substantially alleged in the answer that the company was accustomed to make with shippers of live-stock, at that time written contracts by which the shipper assumed certain risks, and which contained other provisions favorable to the company, one of which was that the persons who were allowed to ride in the car with the stock should so ride at their own risk of personal injury from any cause whatever, and that no passes should be given to such persons, but that they should sign their names on the back of the contract; and no such contract was made in this instance with the said Fay, but that said Fay applied to the station agent at New Richmond for a car in which to ship horses, which car was provided for his use.

It is further alleged in the answer, that after the accident occurred, and said Lawson was seriously injured therein, the said Fay and the station agent at New Richmond made out and executed one of said written contracts, and signed the name of said Lawson on the back without authority from the company, and that said Fay was not the owner of all of said stock, and that two other persons rode

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in said car with the deceased, and that they three conspired to obtain in this way a free passage. There was evidence that said Fay and the agent at New Richmond made the said verbal contract of shipment, which provided that one person should ride in the same car with the horses, to take care of them, and that said Lawson, the deceased, went into said car for such purpose, with the knowledge and consent of the conductor of said train, before the car was placed next to the tender in said train, and that Fay had no knowledge of any such customary written contracts in such cases.

There was no evidence whatever of any conspiracy between said Lawson and the two other persons in said car with him to obtain a clandestine and free ride on said train. Whether said Fay was the owner of all the twelve horses shipped was quite immaterial to the deceased, rightfully within said car, and was very properly omitted from the special findings and verdict of the jury. There was evidence tending to show that it was customary for the defendant company to carry at least one person free in a car-load of horses of such number, to take care of them, and that such person was useful in keeping horses so shipped quiet and from injury when the cars were in motion. This statement of the case is sufficient to make intelligible the positions assumed by the learned counsel of the appellant.

First. That there was no contract between Fay and the station agent that the deceased should accompany the horses in the car, so as to create the relation of carrier and passenger between him and the company. The learned counsel, in assuming that Lawson was a common passenger, or a passenger in the ordinary sense, if he had any right to ride on that train anywhere, and in citing authorities applicable to such a view of his relation to the company, scarcely meets the real question here presented. Lawson was, in a sense, a passenger; but he was more than a passenger. He held responsible relations to the stock in his care, and connected with it by the alleged contract of shipment. His place on that train was in the car with the horses, and to care for them, or it was nowhere; and he had no right to be carried on that train in any other place. He was to be carried free and without charge, because he was to be carried in that way. He had no right to be carried in the caboose, or in any other car or place on that train, according to the agreement and understanding of the agent, Gault and Fay. It was quite immaterial that the deceased was not

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at the time named as the person to ride in the car with the horses. By the agreement, Fay was authorized to place one person in the car with the horses to take care of them, and the agent did not see fit to have such person named, as he might have done, and Fay carried out the agreement by placing the defendant in the car for such purpose, with the knowledge and assent of the conductor of the train. It is too plain for argument that the deceased was rightfully in the car under the agreement, and was no intruder or trespasser, and the company owed him the duty to carry him there safely by the exercise of reasonable care. The custom of the company in other cases of carrying horses, and with them in the same car some person to take care of them on the route, repels the idea that this case was extraordinary or exceptional. The authorities cited by the learned counsel of the appellant related to common passengers who voluntarily placed themselves where they had no right to be under the contract for their carriage. This is a different case. The deceased occupied the very place where he should have been, and was connected with the live-stock carried so intimately that they could not properly be separated without possible danger to it from the want of his personal care and attention. These are special circumstances attending such a case not present in cases of common passenger carriage. In the case cited by counsel for appellant of *Euton v. D., L. & W. R. Co.*, 57 N. Y. 382; s. c., 15 Am. Rep. 513, it was held that the conductor of a coal train who invited a person to ride thereon free did not bind the company, or create the relation of carrier and passenger between such person and the company. In the opinion in that case however cases are cited approvingly of persons riding on gravel trains "under certain circumstances," who might recover for injuries occasioned by collision.

Second. Had the station agent authority to agree with Fay verbally to carry his horses on a freight car, and one person with them to take care of them? It is insisted by appellant's counsel that the station agent had no authority to make such verbal agreement, and had authority only to make such customary written stock contract as set out in the answer. There is very little if any substantial difference between the agreement made and the one which it is admitted the agent had authority to make. Both provide for the carrying of one person, with such number of horses on the same car without charge. The signing of such person's name on the back

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of the written contract could have no effect except to bind such person to the stipulation that he was to take the "risk of personal injury from any and every cause whatever." Such a stipulation would not have exonerated the company from liability in case of gross negligence. *Black v. Goodrich Transp. Co.*, 55 Wis. 322; s. c., 42 Am. Rep. 713, and cases there cited. The difference between the contract made and the one that the counsel of the appellant now contends ought to have been made is merely formal, and the authority of the agent to make substantially the contract that he did make is virtually conceded. That class of cases relied upon by the appellant's counsel to show that the agent of a carrier company cannot bind the company by contract in violation of his instructions, or outside of the legitimate scope of the particular business with which he is intrusted, is inapplicable to this case. The law is well settled that if the agent had authority to make such a contract, and in making it he violates his special instructions as to the mere form of it, of which the shipper has no notice, the company is bound. If the agent has the general authority to make certain contracts, but is restricted by private instructions not known to the other contracting party as to the manner of making them, the principal is bound. This rule is based on the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealings with agents. Story on Agency, §§ 73, 126, 133.

Much stress in the argument is laid upon the want of authority in the conductor to permit or allow the deceased to ride in the car with the horses. This question is not of much importance when it is clear that if the testimony of Fay and Marvin is to be believed—and the jury had the right to believe it—the deceased was rightfully in that car by contract and understanding with the agent, and by other testimony such a contract was sanctioned by previous custom. There was evidence that the deceased was allowed and permitted by the conductor to so ride, or at least that he knew of it and assented to it. It having been customary for a person to so ride in company with horses carried upon said road, the conductor's authority to grant such permission would seem to fall within his general authority in the management and control of the train. *Bass v. C. & N. W. R. Co.*, 36 Wis. 463; s. c., 17 Am. Rep. 495; *Craker v. C. & N. W. R. Co.*, 36 Wis. 670; s. c., 17 Am. Rep. 504; *C., M. & St. P. R. Co. v. Ross*, 112 U. S. 377.

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We conclude therefore that the deceased was rightfully a passenger upon said train under peculiar circumstances, sanctioned both by the contract and custom of the company. What has already been said supports the ruling of the Circuit Court in rejecting the evidence offered to prove what were the private instructions of the company to its agents as to the form in which such contracts should be made, without showing or offering to show that Fay had knowledge of them.

Third. Did the deceased by his negligence contribute to the injury which caused his death? This was a proper question for the jury to decide, and their verdict should not be disturbed unless the facts were such as to warrant this court in holding, as a matter of law, that the deceased was guilty of a want of ordinary care, and that such negligence *per se* contributed to his injury and death. Whart. Neg., § 420 *et seq.*; *North Penn. R. Co. v. Kirk*, 90 Penn. St. 15; *Karasich v. Hasbrouck*, 28 Wis. 569. Was it so unusual and so clearly dangerous for the deceased to have been carried in that car with the horses, and was his riding therein so much the cause of his injury, that it can be said without hesitation that he was guilty of a want of ordinary care which contributed to his injury? Can it be said that an ordinary prudent man would not have done so? We think not. When the deceased entered the car he had a right to suppose it would be placed in a safe and proper position in the train. But the company's servants placed it next to the tender, and by reason thereof it was the only car in the train that was demolished by the collision. It was customary for other men to so ride in the car with horses, and the injury to such occasioned thereby is not so frequent as to make such a place necessarily or probably dangerous. The testimony was that it was proper and useful for some one to so ride with horses to take care of them and quiet them and keep them from injury. Such service would seem to be a reasonable, as well as common, if not a necessary employment. The deceased could not have been carried in the caboose, or any where else on that train consistently with his employment. He was in the car with the horses in the discharge of his duty, and as we have seen, he was rightfully there. The jury properly found that he was not guilty of a want of ordinary care in riding in the car in which he received his injuries, which contributed directly to the injury, and that he was not asleep at the time of the accident. They also found that he entered that car for the purpose of caring

Will of Walter.

for the stock during the journey, and that it was usual on that road for men in charge of stock of this kind, and loaded as this was, to ride in the car with such stock. These findings we cannot disturb.

There was no evidence whatever that the deceased entered the car with the horses clandestinely or to steal a ride or to defraud the company, and therefore the authorities applicable to such a case have no force.

The respondent was allowed to show the circumstances of the collision, against the objection of the appellant, in order to show that the servants of the company were guilty of gross negligence. According to the brief of the learned counsel of the appellant, "it made no difference in the case, so long as defendant was negligent. If plaintiff showed herself otherwise entitled to recover, she could only be defeated by showing negligence on her husband's part." This being so, proof of gross negligence was immaterial and could do no harm. But we think proof of the accident and its circumstances was proper, and that it justified the finding of gross negligence. The negligence of the company was charged in the complaint and admitted in the answer, but its degree was an open question for the jury.

This disposes of the main questions raised in the brief of appellant's counsel.

[Omitting minor questions.]

This case was very ably and fully tried. The rulings of the court and the charge to the jury were considerate and judicious. The findings of the jury are all supported by competent evidence.

BY THE COURT. — The judgment of the Circuit Court is affirmed. Motion for a rehearing denied.

Judgment affirmed.

WILL OF WALTER.

(64 Wis. 487.)

Will — in language not understood by testator.

A will may be valid although written in a language not understood by the testator.

APPEAL from probate. The will was written in English, but the testatrix was a German and did not understand English.

Will of Walter.

Conrad Krez, for appellants.

Wm. H. Seaman, for respondent.

LYON, J. The learned counsel for the appellants challenges the accuracy of each and every finding of fact except the first, which states the residence of the testatrix and the date of the death, and that portion of the third which finds she was a German and did not understand the English language. He argues with much ingenuity that the testimony fails to prove any of the propositions of fact thus challenged. After an attentive perusal of the testimony we find ourselves unable to agree with the counsel. We think that every fact essential to the validity of the will was established by a fair preponderance of the testimony; or at least, that there was no such clear preponderance of testimony against any material finding of fact as will authorize this court to set it aside. We do not deem it necessary, in this opinion to set out the testimony or discuss it at length. The statement of our conclusions therefrom must suffice.

Aside from the finding that the testatrix did not understand the language in which her alleged will was written, it cannot be doubted that the other findings of fact fully justify the admitting of the instrument to probate as her last will and testament. We are thus brought to consider the only question of law presented by this appeal, to-wit: Should an instrument executed with all the formalities which the law makes essential to a valid execution of a will, which purports to be the last will and testament of the deceased person so executing it, and which expresses his will and intentions, be denied probate for the sole reason that such person did not understand the language in which the instrument was written?

This is an interesting, and perhaps an important question. It has not heretofore been raised in this court to our knowledge, and the industry of counsel has failed to find a direct adjudication of the question elsewhere. However, in *Redfield on Wills*, to the statement in the text that "it seems to be well settled that the testator may put his will in any language he may choose," there is a note in which the author says: "We doubt if the common law will allow of a written will being expressed in a language not understood by the testator. That would seem indispensable to any understanding execution of the instrument." Vol. 1, p. 166 (4th ed.), note 8. No case or authority is cited to support the opinion intimated in the

last extract. The reason given for this opinion is, in effect, that a person cannot have an understanding of the contents of an instrument unless it be written in a language he knows. True, he may not get such understanding by reading the instrument himself, but there are other methods by which he can be accurately informed thereof, although he may not be able to read understandingly a word of the instrument. A vast amount of accurate knowledge is alone imparted to the mass of mankind by means of translations from languages understood by but few. Such is the foundation of our belief in very many most important accepted truths in theology, science and history. Important writings are frequently signed without perusal, the signer relying upon the statement of another who knows what the instrument contains as to its contents. If the informant states such contents truly, the signer knows just what he has signed. Were an issue made up as to whether the signer of a written instrument knew its contents when he signed it, and the proofs should show that he never read it, but was accurately informed of its contents orally, before he signed it, by a person who had read it, the issue would necessarily be found in the affirmative—that is, that the signer knew the contents of the instrument.

There can be no doubt, we think, that a person who signs an obligation or promise, with knowledge of its contents imparted to him by parol is liable thereon, although it may be written in a language he does not understand. The question is not by what means or instrumentalities the signer was informed of the contents of the instrument, but did he know its contents when he signed it?

No good reason is perceived why this is not also true of wills. Of course, it is essential to a valid will that the testator should have had an intelligent understanding and comprehension of its contents when he executed it. The formalities required by law in the execution of wills are prescribed for the purpose (among others) of preserving satisfactory evidence that the testator in each case had such understanding of the contents of his will. But the law does not require that he shall read his will before execution, or be able to read it as a condition to its validity. If such were the law, the blind or those persons who from illiteracy or other cause are unable to read, could never make a valid written testament. The same would be true of many persons who may desire to execute a written will when in *extremis*, and who are otherwise competent to do so. It has long been held that persons thus circumstanced may execute

Will of Walter.

valid written wills. And if the will of any such person is drawn in accordance with his instructions, although not read over to him, it seems now to be settled that if otherwise sufficient, it is a valid will. 1 Redf. Wills, p. 57, ch. 3, sec. 6, subd. 5.

We perceive no substantial difference in principle between the cases above referred to and one in which a will is drawn up in a language which the testator does not understand. In cases belonging to either class the court should require satisfactory proof that the testator was correctly informed of the contents of the instrument he was about to execute. Such proof was made in the present case, and in addition thereto it was proved that the instrument was drawn in strict compliance with the instructions of the testatrix in that behalf.

In view of the well-known fact that quite a large percentage of the people of this State do not understand the English language, and of the probability that many wills of such people, written in English, have been admitted to probate, we should adopt the rule here suggested, even though the argument against it were much stronger than it is. Otherwise great mischief might be done by defeating the real will of the testators, carefully expressed and duly verified in the manner prescribed by statute, and by unsettling estates supposed to be settled, and divesting rights of property believed to be fully vested. If the same circumstances had existed generally in this country when Judge Redfield wrote the intimation above mentioned, we greatly doubt whether he would have thought that the rule there suggested (even conceding it to be a rule of the common law) was at all applicable to the condition and circumstances of our people.

Our conclusion is that because the instrument in question was freely executed by the testatrix in due form of law, with full and accurate knowledge of its contents and in accordance with her instructions (she being of sound mind), it was properly admitted to probate and established as her last will and testament, notwithstanding it was written in the English language, which she could not read or understand.

BY THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Thompson v. Western Union Telegraph Company

THOMPSON V. WESTERN UNION TELEGRAPH COMPANY.

(84 Wis. 581.)

Telegraph — limiting liability — negligence — damages.

The following telegram was written upon a blank stipulating that the company should not be liable for mistakes or delays in the transmission or delivery of any unrepeatd message, by negligence of its servants or otherwise, beyond the amount received for sending the same: "Send bay horse to-day. Mock loads to-night." The message was not repeated, and was delayed in transmission by the defendant's negligence, and the sender lost the sale of the horse in consequence. Mock was a well-known horse dealer, in the habit of shipping horses at that place. *Held* (1) that the stipulation did not prevent a recovery for a want of ordinary care and diligence; (2) actual damages were recoverable.*

ACTION of damages for delay of a telegram. The opinion states the case. The plaintiff had judgment below.

Brooks & Dutcher, for appellant.

Wilson & Provis, for respondents.

TAYLOR, J. The respondents brought their action in justice's court against the appellant company to recover damages of the company for negligently delaying the transmission and delivery of the following telegram, delivered by the plaintiffs to the agent of the appellant at Boscobel, in this State, viz.:

"BOSCOBEL, April 26, 1884

"To E. G. Thompson, Fennimore, Wis.: Send bay horse to-day. Mock loads to night.

[Signed]

"WILLIAM THOMPSON."

This message was delivered to the agent of the company at Boscobel at ten A. M., on the 26th of April, 1884, and was not delivered at Fennimore until about ten A. M. on the 28th of April, 1884. The distance between Boscobel and Fennimore is about twelve miles. The company has a telegraph line between the two places. To send the message over the lines it would go first to Milwaukee and from there to Fennimore. The agent of the company at

* See *Womack W. U. Tel. Co.* (58 Tex. 176), 44 Am. Rep. 614; notes, 45 Am. Rep. 486; 88 Am. Rep. 361.

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Fennimore says he received the message at ten o'clock A. M. on the 28th, and delivered it to the person to whom it was sent in three minutes after it was received. The usual time for sending a dispatch from Milwaukee to Fennimore is about twenty minutes. It was also stated by the operator at Boscobel that he sent the message to Milwaukee as soon as it was received by him from the plaintiff. The delay was between Milwaukee and Fennimore. The 26th of April, 1884, was Saturday.

The respondents recovered in justice's court, and the company appealed to the Circuit Court. A trial was had in that court, and the respondents recovered a verdict for \$25 damages, for which they had judgment, and the company appeals to this court. Upon the argument in this court, the counsel for the appellant insists that upon the proofs the plaintiff was entitled to recover only the money paid for sending the message, and as that had been tendered after the action was commenced, together with the costs of the action up to the time of the tender, the judgment should have been in favor of the appellant. This proposition, it is insisted, should be sustained upon two grounds: (1) Because such was the contract between the parties at the time the message was sent; and (2) upon the facts proved and under the complaint, such is the extent of the damages the plaintiff is entitled to recover against the appellant in this action.

The telegram was written upon one of the blanks of the company, and the plaintiff admits that he knew the contents of said blank when he sent the message. The following is printed on such blanks, viz.:

" All messages taken by this company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interrup-

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tion in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination.

“Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employee of the company is authorized to vary the foregoing.”

It is not alleged in the complaint, nor proved upon the trial, that any reason was given by the plaintiff to the agent at Boscobel for sending the message, except what appears on the face of it; but he testifies that he told the agent to “hurry it up.”

It is insisted that according to the terms of the contract signed by the plaintiff when he sent his message, the company is relieved from all liability to respond in damages to the plaintiff for any neglect or delay in forwarding or delivering the message, beyond the repayment of the money paid the company for sending the same. Whatever may be the decisions of other courts in other States upon this question, we think the decisions of this court settle the question against the appellant. *Candee v. W. U. Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452; *Hibbard v. W. U. Tel. Co.*, 33 Wis. 558, 568. In these cases the telegrams were sent as night dispatches, upon printed blanks of the company by the terms of which such messages were sent at half the usual rates for day messages, “on condition that the company should not be liable for errors or delays in the transmission or delivery, or non-delivery, of such messages, from whatever cause occurring and should only be bound in such cases to return the amount paid by the sender.” In both cases it was held that the contract was void as against public policy so far as it undertakes to protect the company from liability for the negligence or fraud of its agents. In the last case cited the present chief justice says, quoting from the opinion in *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 751; s. c., 6 Am. Rep. 165: “While telegraph companies are not insurers and do not guarantee the delivery of all messages with entire accuracy and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of

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their servants and agents;" "and this degree of liability the law imposes upon them, as well in the transmission and delivery of a night as of a day dispatch." Chief Justice DIXON, in the *Candee* case says: "Either the company enters into a contract with him (the sender of the message), and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them; and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender."

We are quite satisfied with the decisions of this court above cited, and with the reasons given to sustain them, and we believe they are in accord with the weight of authority in other courts. See *U. S. Tel. Co. v. Gildersleve*, 29 Md. 248; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; s. c., 6 Am. Rep. 165; *Breese v. U. S. Tel. Co.*, 48 N. Y. 140; s. c., 8 Am. Rep. 526; *Bartlett v. W. U. Tel. Co.*, 62 Me. 209; s. c., 16 Am. Rep. 437; *N. Y. & W. P. Tel. Co. v. Dryburgh*, 35 Penn. St. 298; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; s. c., 41 Am. Rep. 509; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Abraham v. W. U. T. Co.*, 23 Fed. Rep. 315; *Express Co. v. Caldwell*, 21 Wall. 269; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422; *White v. W. U. Tel. Co.*, 14 Fed. Rep. 710, 718; *True v. International Tel. Co.*, 60 Me. 9; s. c., 11 Am. Rep. 156; *Wann v. W. U. Tel. Co.*, 37 Mo. 482.

In holding that the telegraph company was liable to the plaintiff upon the facts proved in this case, we do not wish to be understood as holding that the company, under the agreement in question, would be liable for a mere mistake as to the accuracy of the message sent, or in its delivery, which might occur in the transmission or delivery notwithstanding the exercise of ordinary care on the part of the company, its agents and servants. The evidence in this case shows a want of ordinary care and diligence in the transmission and delivery of the message when unexplained, and not a mere mistake

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which might occur consistently with the exercise of ordinary care. The learned Circuit judge did not err in charging the jury that "it was the duty of the defendant company to transmit the message with reasonable care and diligence, and in so far as the contract at the head of the message blank undertakes to limit or change this liability, it is void.

The only other question in the case is whether the plaintiff, upon the facts proved, was entitled to recover more than nominal damages. It seems to us that the telegram itself informed the agent of the company that it was of importance that the horse mentioned therein should be sent to Boscobel immediately on receipt of the telegram, so that he would arrive there before Mock would load his horses that evening. It was shown on the trial that Mock was a well known purchaser of horses in that vicinity, and was in the habit of shipping horses purchased from that place to Milwaukee; and in the absence of evidence to the contrary it may be presumed that the agent of the company knew that fact. The telegram fairly conveyed the idea to the agent that this horse was wanted on that day at Boscobel for the purpose of sale to Mock. This was indicated by the words in the telegram, "Mock loads to-night." The evidence clearly tended to show that the plaintiffs lost the sale of the horse to Mock by reason of the delay in transmitting the message, and that the loss of such sale was a damage, to them of \$25, which was the amount they recovered.

We think the case was correctly decided at the Circuit, and there are no errors in the record which should cause a reversal of the judgment. This decision, as well as the two above quoted made by this court, are in accord with the policy of this State as evidenced by the enactment of chapter 171, Laws of 1885. This chapter expressly declares that all telegraph companies doing business in this State shall be liable "for all damages occasioned by failure or negligence of their operators, servants or employees in receiving, copying, transmitting or delivering dispatches or messages."

BY THE COURT.— The judgment of the Circuit Court is affirmed.

Judgment affirmed.

DeVoin v. Michigan Lumber Company.

DEVAIN V. MICHIGAN LUMBER COMPANY.

(84 Wis. 616.)

Master and servant — use of hired horses for work not contemplated.

Where one party lets his team and driver to another, to be used in a certain place and for a certain purpose, and while being used in a different place and for a different purpose, without the bailor's consent, the team is lost without any negligence of the driver, the hirer is responsible therefor.

ACTION of damages for loss of a team of hired horses. The opinion states the point. The plaintiff had judgment below.

H. H. Grace, for appellant.

L. A. Pradt, for respondent.

CASSODAY, J. The court stated to the jury that it was admitted, or proved by uncontradicted evidence, that at the time of the accident the team and driver "were in the employ of the defendant * * * for the purpose of hauling logs." It is now claimed that this was a controverted question of fact for the jury to determine. The only witness of the defendant on that question testified, in effect, that he, in behalf of the defendant, made the contract of hire with the plaintiff; that he hired the team and driver "to haul logs, and to haul supplies to Sugar Camp or Rocky Run, just as he was a mind to have him." It is undisputed that for the time being the team and driver had stopped hauling supplies, and had gone to Rocky Run for the express purpose of hauling logs, and had hauled logs there for one day. There is no claim, nor any testimony to support any claim, of any express contract with the plaintiff that the team should be used in hauling hay or supplies from any other place than Rhineland. The defendant did give evidence tending to prove that by the general custom in the vicinity, it was understood that when a team was hired to haul logs it included the right to use the same to haul a load of supplies, or a load of hay or any thing of that description. The court was very liberal in its allowance of evidence of such general custom. The plaintiff denied any knowledge of the existence of such custom. The question whether such custom existed was fairly submitted to the jury. The verdict

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for the plaintiff negatived the existence of such custom, and established the fact as a verity that by the express contract of hire the team was only to be used in hauling supplies from Rhineland, or logs at Lucky Run.

The defendant requested the court to instruct the jury in effect that the driver was the agent of the plaintiff; that his consent to go for the hay was the consent of the plaintiff, and hence that he could not recover; and that if the injury occurred through the driver's negligence, then the plaintiff could not recover. For the refusal to give such several instructions errors are assigned.

In a limited sense the driver was the agent of the plaintiff. He was such agent in caring for and driving the team in hauling supplies from Rhineland and logs at Rocky Run. That included the proper feeding and handling of the team. He was only twenty-two years of age, but had some experience in driving teams. There is no claim nor evidence tending to prove that he was negligent in the act of handling the team. There was a road to the first stack. It had been cut by the guide sent with the driver. Near the first stack the road was along on the ice on the river. There was no difficulty in getting to the first stack. Between that stack and the other stack there was no road nor any broken path. It seems to have been, or at least a portion of it, right along on the river. But the water was frozen over, and the ice was covered with snow. The space between the two stacks appeared to be level snow, and there was no unusual appearance around or about the place where the accident occurred. The driver had never been there before. There is no evidence that there was any safer way or any other way to the second stack. There is no evidence that the team was not driven properly and in the way directed by the guide, who appears to have known of the *locus in quo*. The age of the guide is not given, but he was selected by the defendant's foreman for the purposes indicated. The accident did not occur by reason of any negligence in the mere driving or handling the team, but in obeying the directions given by the foreman and guide, and driving the team into a dangerous place without knowing it to be dangerous. If the driver was negligent at all, it was in obeying directions and driving out upon the ice for the first time without first testing its strength. If the guide was negligent in walking behind the sled while being driven to the second stack, instead of going ahead of the team and testing the ice, yet as the service in which they were then engaged

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was not such as was contemplated in the contract of hire, he was not a co-employee with the driver in such a sense as to relieve the defendant from liability on account of such negligence. *Railroad Co. v. Fort*, 17 Wall. 553; *Mann v. Oriental P. W.*, 11 R. I. 152; *Lalor v. C., B. & Q. R. Co.*, 52 Ill. 401; s. c., 4 Am. Rep. 616.

Was the driver the agent of the plaintiff in the act of obeying the directions of the defendant's foreman and guide, at a place distant from the camp, and in a kind of work not contemplated by the contract of hire? It seems to us that he was not. Of course the driver was selected by the plaintiff to drive the team in performing the work contemplated in the contract of hire. Had the injury occurred by reason of any negligence or incompetency of the driver while engaged in the work or service so contemplated by the contract of hire, then the loss would have fallen upon the plaintiff; for by selecting him to drive his team, he had taken upon himself the responsibility of the requisite care and competency of the person so selected in doing the work he had contracted to have him do. *Quarman v. Burnett*, 6 Mees. & W. 499; *Jones v. Mayor*, 14 Q. B. Div. 890; *Huff v. Ford*, 126 Mass. 24; s. c., 30 Am. Rep. 645; *Joslin v. Grand Rapids I. Co.*, 50 Mich. 516; s. c., 45 Am. Rep. 54. And yet, while engaged in such contemplated work, had the team been injured solely by reason of having been driven by the careless direction of the defendant into some place of danger, not obvious to the senses and unknown to the driver, there would be no question of the defendant's liability. *Indermaur v. Dames*, 2 C. P. Div. 311. In such contemplated service the defendant was still under obligation to exercise reasonable diligence in providing a suitable place for the team to be driven; or in other words, not to carelessly cause the team to be driven into a place of concealed danger unknown to the driver. *Indermaur v. Dames*, 2 C. P. Div. 311; *Coombs v. New Bedford C. Co.*, 102 Mass. 583, 584; s. c., 3 Am. Rep. 506; *Swoboda v. Ward*, 40 Mich. 423; *Parkhurst v. Johnson*, 50 Mich. 70. In case of injury in such contemplated service, the mere fact that the driver was in a limited sense the agent of the plaintiff, as indicated, would not take away the liability of the defendant, under whose orders and control he was acting at the time, for negligently inducing him to drive into a place of concealed danger. *Rourke v. White M. C. Co.*, 2 C. P. Div. 205.

But the case at bar is more favorable for the plaintiff than any supposed. Here the injury occurred when neither the

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team nor the driver were engaged in the work contemplated in the contract of hire. They were both however doing service for the defendant under the directions of its foreman and the guide selected by him. The team was drowned solely by reason of being driven by such direction into a place of concealed danger unknown to the driver. Had not the team at the time of the injury been accompanied and driven by the driver selected and employed by the plaintiff, there could be no question but what such diverted use of the team would have been a conversion within all the authorities. *Wheelock v. Wheelright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Hall v. Corcoran*, 107 Mass. 251; s. c., 9 Am. Rep. 60; *Woodman v. Hubbard*, 25 N. H. 67; *Hart v. Skinner*, 16 Vt. 138; s. c., 42 Am. Dec. 500. The same rule has been applied to the unauthorized use of slaves. *Horsely v. Branch*, 1 Humph. 199; *Scruggs v. Davis*, 5 Sneed, 261; *Moseley v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Ala. 26; *Spencer v. Pilcher*, 8 Leigh, 566. For the loss during such diversion or misuse, the defendant would have been absolutely liable, even though it occurred by reason of the fault of the horses or as a mere accident. *Lucas v. Trumbull*, 15 Gray, 306; *Perham v. Coney*, 117 Mass. 102; *Fisher v. Kyle*, 27 Mich. 454; *Lane v. Cameron*, 88 Wis. 603. Does the mere fact that the driver consented to the diversion of employment, and was in the act of driving the team when the accident occurred, relieve the defendant from the liability which would otherwise have existed? We must answer this question in the negative. There is no claim that he participated in or was even present at the time of making the contract of hire; nor that he had any authority to modify the contract or make a new one. The case is quite similar in principle to *Crocker v. Gullifer*, 44 Me. 491, where one of the drivers had a conditional interest in the horses and consented to their diversion, but it was held that the defendants were liable for their value, notwithstanding they were accidentally destroyed by fire without the neglect or fault of any one.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

SMITH V. BROOKLYN SAVINGS BANK.

(101 N.Y.58.)

Banks — savings — unauthorized payments.

In a pass-book issued by a savings bank to a depositor was a printed by-law, as follows: "All payments made by the bank upon the presentation of the pass-book, and duly entered therein will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book." *Held*, that this did not authorize a payment to a stranger whose only evidence of authority to receive it was the possession of the pass-book.*

ACTION to recover a savings bank deposit. The opinion states the case. The defendant had judgment below.

James Troy, for appellant.

Wm. S. Cogswell, for respondent.

RUGER, C. J. The defendant, a savings bank, seeks to justify the payment by it of a depositor's money, to a stranger upon the ground that such payments were made to a person having possession of the depositor's pass-book. Such a pass-book is not negotiable

* See *Kimball v. Norton* (59 N. H. 1), 47 Am. Rep. 171.

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paper, and its possession constitutes in itself no evidence of a right to draw money thereon. It merely imports a liability of the bank to the depositor for the moneys deposited, and an agreement to repay them at such time and in such manner as he shall direct. This contract is implied from the nature and objects of the transaction occurring between the parties. *Crawford v. West Side Bank*, 100 N. Y. 51; s. c., 53 Am. Rep. 152. The depositor may by special contract authorize payments to be made in some other manner than by his directions, but in order to make such payments a protection to the bank, it is necessary for it to show some special agreement with the customer, authorizing such a mode of payment.

The defendant in this case claims to have had such authority by force of a by-law printed in the pass-book, delivered to the plaintiff at the time of making his first deposit. Assuming for the purpose of the argument, that the mere acceptance by the depositor of a pass-book containing by-laws regulating the manner of making deposits and payments constitutes a contract between the parties, we will inquire into the meaning and intent of the by-law referred to. It reads as follows: "All deposits and drafts must be entered in the pass-book at the time of the transaction, and all payments made by the bank, upon the presentation of the pass-book, and duly entered therein, will be regarded as binding upon the depositor. Money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book. No money shall be received, nor shall any money be paid out except by the teller at the bank in the presence of an officer or trustee. No money shall be withdrawn as a matter of right without three months' previous notice." We do not think this by-law supports the contention of the defendant.

It is argued by it that the phrase "all payments," as used therein, means any sum of money, delivered by it, to any person who may for the time being have in his possession the pass-book, and it is only by assuming that such a delivery of money is a payment upon that account, that any color of support is afforded to the argument. This may have been the understanding and intention of the bank in framing the by-law, but in order to make that understanding obligatory upon the customer, it was also necessary that he should have a similar understanding, or that the law should have been expressed in language incapable of any other fair construction. We do not think that the word "payments," as used in it, can

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according to the legal or common acceptation or meaning of the word, be construed to mean any sums which the bank might choose to disburse, regardless of the person to whom they were made. Payment by a debtor can be legally made only to the creditor or his authorized representative, and in order to constitute any other transaction a payment, it is essential to its validity, that it should be authorized by the person entitled to demand it.

The defendants have not here shown any such authority. An agreement that payments made in a particular manner shall be binding and conclusive upon the depositor does not tend to authorize a payment made to a stranger, or give any other signification to the word "payment" than it usually bears. The effect which, it is argued, should be given to the language used can be indulged in only by force of a contract with the depositor; but it is here attempted to imply the contract from the mere use of the word "payments," etc. This is reasoning in a circle, and proves nothing.

Further examination of the provisions of the law confirms our views. It is quite improbable that so important a power should have been left to be inferred from loose and doubtful phraseology, if it had been originally intended to be conferred by the parties, and the plaintiff is entitled in this case to that construction of the by-law which makes it conform to the popular and ordinary signification of its language.

The by-law seems to contemplate but two modes of payment, both of which require the presentation of the pass-book as the condition thereof, one apparently authorizing a payment to the depositor, personally, and the other, one which may be made in his absence. The one provides for the conclusive effect of payments made, and duly entered in the pass-book, and the other, for payments made in his absence to a third person, having possession of the pass-book. This provision requires the depositor's written order to accompany the pass-book.

The fair implication from this provision is, that no other payments to strangers are contemplated or authorized. *Expressio unius est exclusio alterius*. Any other construction of the by-law would render the clause referred to unmeaning and inoperative. If the bank were authorized to make payments to a stranger, having possession of the pass-book alone, the provision authorizing the bank also to make such payments to a stranger, not only having

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possession of the pass-book, but also of the depositor's written order, would be useless and unmeaning.

It is the duty of a court to give effect to all of the provisions and language used in framing a law, if it is susceptible of such a construction, and they are precluded from giving it such an effect as will render any of its clauses inoperative or ineffectual. Such a construction as we have indicated is the only one which gives a legitimate operation to the clause referring to a written order.

This case is not affected by the decisions in *Shoenwald v. Metropolitan Bank*, 57 N. Y. 415, and similar cases, where the language of the contract was substantially different. There the language of the by-law plainly implied and provided for payment, made to other persons than the depositor, and gave a signification to the word "payments" which included strangers having possession of the pass-book.

The conclusion reached by us, as to the authority conferred by this by-law upon the bank in making payments, renders it unnecessary to refer to the other questions in the case. It may not however be inappropriate to say that we are also of the opinion that within the cases of *Boone v. Citizens' Savings Bank*, 84 N. Y. 88; s. c., 38 Am. Rep. 498, and *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 321, the court below erred in refusing to submit the question to the jury as to whether upon the evidence in the case the defendant exercised reasonable care and prudence in making the alleged payments.

It follows of course from this, that the trial court also erred in excluding evidence tending to show the want of care and prudence on the part of the bank in disbursing the plaintiff's funds.

The judgments of the General and Trial Terms should be reversed, and a new trial ordered, with costs to abide the result.

All concur.

Judgment reversed.

Heurtematte v. Morris.

HEURTEMATTE V. MORRIS.

(101 N. Y. 68.)

Negotiable instrument — bona fide holder — consideration.

An agent at Nicaragua having collected a claim for his principal, the plaintiff, at Panama, sent him a draft for the net proceeds, drawn by him on the defendant at New York, which was received by the plaintiff in place of the money collected, and was accepted by the defendant, but was not paid. *Held*, that the plaintiff was a *bona fide* holder for value, and that the defendant was estopped from showing that his acceptance was without consideration or induced by the drawer's fraud.

ACTION on a bill of exchange. The opinion states the case. The plaintiff had a verdict, which was set aside by the General Term.

F. R. Conder, for appellant.

C. E. Coddington, for respondent.

RUGER, C. J. In the discussion of this case it is unnecessary to consider particularly the agency of Hourquet & Poylo in the transaction, as they acted solely as the gratuitous agents of the plaintiffs, and had no interest in the subject of the business. It may therefore be treated as a transaction occurring directly between the plaintiffs and Ran Runnels, and concisely described, was to the following effect: The plaintiffs were merchants doing business in Panama, and one Christofel was a customer and debtor of theirs, residing at San Juan del Sur, near Rivas, in the State of Nicaragua. Christofel was desirous of discharging his obligations to the plaintiffs, but was embarrassed in doing so by the infrequency of communication between Rivas and Panama, and the want of a system of exchange enabling him to transmit funds safely and expeditiously from one place to the other. Under these circumstances the plaintiffs consulted Hourquet & Poylo, a business firm at Panama, as to the best manner of collecting the debt. The plaintiffs were informed by Hourquet & Poylo that Ran Runnels was a correspondent of theirs residing at Rivas, and that the collection could probably be made through him, and offered to transmit a draft on Christofel to Runnels, for that purpose. Thereupon the plaintiffs made

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their draft on Christofel on sixty days for \$1,000 payable to Hourquet & Poylo, who indorsed the same to Runnels and forwarded it to him at Rivas for collection. In due time it was received by Runnels, and at its maturity was paid to him, in Columbian currency.

It becomes important now to determine the legal obligations and duties of the parties toward each other at this stage of the transaction. In the collection of the draft Runnels acted as the mere agent of the plaintiffs, and had no interest in the proceeds, except perhaps a lien thereon for the value of his services in making the collection. He had no right or authority to use such funds for his individual purposes, and his sole duty in relation to them, was that of their transmission to his principals. The nature of the business impliedly authorized him to make such transmission according to usages of trade, and in the absence of such usages to do so by some other method which should, in the exercise of reasonable care and prudence, promise to accomplish the object intended. It was therefore open to him to transmit the funds received in specie as they were collected, or he could have purchased a bill of exchange, if opportunity served, at that place, and transmitted that; or he could remit them in any other way deemed most safe, convenient and desirable to him, subject to the approval by his principals, of the method adopted. It does not appear in the case but that Runnels was a merchant or banker and accustomed to sell exchange upon foreign places. However that may be, he in fact sent to the plaintiffs, February 4, 1879, immediately upon collection, the proceeds thereof, less cost of collection and exchange, by the draft in suit. This was his own draft upon the defendant Morris, at New York, at ninety days' sight. Upon the receipt of this draft by the plaintiffs, it was accepted by them and remitted to New York, for presentation to and acceptance by the drawee, and the same was accepted by him February 26, 1879.

The sole question in the case is whether the plaintiffs were *bona fide* holders for value of the draft. We cannot doubt but that they were. If on receiving the funds in question Runnels had purchased with them a bill of exchange or draft from a merchant, or banker, according to the usages of trade, and transmitted the same to the plaintiffs, no question could arise but that he acted as their agent in the transaction, and they would have been *bona fide* holders of such paper within all definitions of that character, and we are unable to see the difference in principle between such a case and

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the transaction in question. The funds collected by Runnels were, until they consented to their appropriation by him, at all times the property of the plaintiffs. Runnels' sole duty in relation to them was that of transmission to the plaintiffs, and until that duty was legally performed he held them in a fiduciary capacity for a specified purpose. His duty of transmission could not be performed by remitting his own obligation, payable at a future day, except by the consent and approval of the plaintiffs. Until this consent and approval was given the funds remained the property of the plaintiffs, and any use of them by Runnels before that time would have constituted a violation of his duty to his principals, which it cannot be presumed he committed.

Doubtless the lack of adequate facilities of exchange between Rivas and Panama induced Runnels to offer, and the plaintiffs to accept, the mode of remittance adopted, and it was entirely competent for Runnels to propose, and for the plaintiffs to accept such a solution of the inconveniences of the situation; but no title to the funds collected passed to Runnels, until the acceptance of the draft by the plaintiffs. After that and not till then he was authorized to use those funds as his own.

By the original employment the plaintiffs contemplated no credit to Runnels and he had no right to, and it does not appear that he even supposed he acquired any right to use the funds in question for his own purposes, or that he ever did so use them. The conventional relation of debtor and creditor never existed between Runnels and the plaintiffs until the acceptance of his draft upon Morris, and then those relations were governed by the liabilities existing by force of the draft alone.

In accordance with the rule which precludes a court from presuming a violation of duty by an individual, we must assume that Runnels performed his duty, and his whole duty, to the plaintiffs as their agent. This required him to safely keep their funds until he had transmitted them according to the usage of trade, or in some other mode approved by them. The legal effect of the method adopted was to transfer the title to the funds collected to Runnels simultaneously with the acceptance by the plaintiffs of Runnels' draft upon Morris, and was the precise equivalent of the payment of so much money in the immediate purchase of a draft or bill of exchange by one person from another. We are therefore of the opinion that the plaintiffs were the *bona fide* holders for value of the draft in suit and are entitled to recover thereon.

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The General Term conceded that the plaintiffs were *bona fide* holders for value of the bill before acceptance, but deny them that character after acceptance as against the acceptor. We think the concession is fatal to the conclusion reached by that court.

It is said that the *Farmers and Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw. 290, is authority for the position. It is true that some expressions of the learned judge writing in that case may justify the citation, yet it should be considered that those remarks were unnecessary to the decision of the case, and the same court have twice since then refused to follow it.

We conceive the rule there laid down finds no support in the doctrines of the text-writers or the reported cases. *Philbrick v. Dallett*, 34 N. Y. Super. Ct. 370; *First Nat. Bank of Portland v. Schuyler*, 39 N. Y. Super. Ct. 440; Pars. Bills and Notes, 323; Dan. Neg. Inst., § 534; Edwards on Bills (2d ed.), 410.

If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. Pars. Bills, 323, 544; *Arpin v. Owens*. The drawee can of course upon presentment refuse to accept a bill, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept a bill, he becomes primarily liable for its payment, not only to its indorsees but also to the drawer himself.

The delivery of a bill or check by one person to another for value implies a representation on the part of the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawee is not allowed to retract. Dan. Neg. Inst. 534; Pars. Bills, 323, 544, 545. By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, is not afterward at liberty to controvert the fact as against a *bona fide* holder for value of the bill.

The payment to the drawer of the purchase-price furnishes a good consideration for the acceptance which he then undertakes shall be made, and its subsequent performance by the drawee is

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only the fulfillment of the contract which the drawer represents he is authorized by the drawee to make.

The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration, or for accommodation, as against a *bona fide* holder for value of such paper, flows logically from the conclusive force given to his admission of funds, and is elementary. Dan. Neg. Inst., §§ 532-534; Edwards Bills, 410; *Harger v. Worrall*, 69 N. Y. 371; s. c., 25 Am. Rep. 206; *Com. Bk. of Lake Erie v. Norton*, 1 Hill, 501; *Robinson v. Reynolds*, 2 Q. B. 196, 211; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181.

Of course the cases determined upon the ground that the payee of such paper received it to apply upon an antecedent debt, or that it had been unlawfully diverted from the purpose for which it was designed, have no application to the circumstances of this case.

The judgments of the courts below should therefore be reversed and a new trial ordered, with costs to abide the result.

All concur.

Judgment reversed.

 ULINE V. NEW YORK CENT. AND HUDSON RIVER RAILROAD CO.

Damages — prospective — nuisance.

SUFFICIENTLY reported, 53 Am. Rep. 123.

 PEOPLE V. MURPHY.

(101 N. Y. 123.)

Evidence — disclosure to physician — declarations.

On a prosecution for abortion, a physician, who after the commission of the crime was selected by the public prosecutor to attend and examine the woman, and did attend and examine her with her consent, was allowed to testify, as a witness for the prosecution, to his opinion, founded on his observation of the woman and her narration of the circumstances, that an abortion had been committed. The woman was alive at the time of the trial. *Held* (1) that the disclosure was prohibited by the statute; (2) that it was incompetent, because a narration of past events and not part of the *res gestæ*.

CONVICTION of abortion. The head-note states the case.

Horace L. Bennett, for appellant.

Jos. W. Taylor, district attorney, for respondent.

FINCH, J. We are of opinion that section 834 of the Code of Civil Procedure is applicable to criminal actions, and that whatever possible doubt may have attended the question is fairly dispelled by section 392 of the Code of Criminal Procedure. The confidential character of disclosures by a patient to his attending physician was established, before the Code, by statute, and in terms which, beyond reasonable question, applied to all actions whether civil or criminal. 3 R. S. (6th ed.) 671, § 119; *People v. Stout*, 3 Park. Cr. 670. That statute was substantially incorporated into the Civil Code, in language broad enough to justify the same general application as that which characterized the older statute; and the further provision of the Code of Criminal Procedure, already referred to, seems to us intended to settle the question. No doubt upon that subject was intimated in *Pierson v. People*, 79 N. Y. 424; s. c., 35 Am. Rep. 524; but in that decision the statute was construed, and we held it did not cover a case where it was invoked solely for the protection of a criminal, and not at all for the benefit of the patient, and where the latter was dead so that an express waiver of the privilege had become impossible. The present is a different case. Here the patient was living, and the disclosure which tended to convict the prisoner inevitably tended to convict her of a crime, or cast discredit and disgrace upon her. We have no doubt upon the evidence that between her and the witness whose disclosure was resisted there was established the relation of physician and patient. Although he was selected by the public prosecutor and sent by him, yet she accepted his services in his professional character, and he rendered them in the same character. She was at liberty to refuse and might have declined his assistance, but when she accepted it, she had a right to deem him her physician and treat him accordingly. It follows that the exception to his disclosure of what he learned while thus in professional attendance was well taken. But if his evidence had been admissible as being competent, another error was committed. He was sent to the patient after the crime was complete, when the abortion had been accomplished,

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and the patient was merely suffering the physical consequences of the act. Although she herself was a party to that crime, and relatively to it, was an accomplice of the accused, and so to speak a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gestæ*, were not admissible. These declarations were excluded by the court upon the objection of the accused, and properly excluded. But notwithstanding the attending physician was allowed to express his opinion as a medical expert that an abortion had been produced, founding that opinion, not only upon what he observed of the physical condition of the woman, but upon all her statements, and upon the history of the case as derived from her. The opinion of the General Term concedes the error of such evidence, but insists that the opinion was founded upon her statements merely of "the locality of the pain, the condition of the injured parts, and so on." We understand what occurred differently. When the witness was first asked his opinion whether the birth occurred from natural or artificial causes, he inquired whether in giving his answer he would be allowed to consider the clinical history of the case as he got it from the girl's statement, to which the prosecutor replied: "Certainly; I ask the question upon the whole history of the case as you learned it from her, as well as from the examination." To this the prisoner objected. The court did not at once pass on the objection, but suggested that the physician answer first from his observation alone. He did so answer and said: "From my physical examination of the woman and the foetus it would lead me to believe that an abortion had been induced," and then added as a reason, that natural miscarriages were not likely to occur at that stage of pregnancy with the frequency of earlier stages. How weak this evidence was upon the vital point whether the miscarriage arose from natural or artificial causes was made apparent on the cross-examination, where in answer to the distinct question "whether or not from such physical examination as you describe you made there, is it possible as a matter of medical knowledge, science and experience to say that a miscarriage had been produced," the witness felt constrained to answer, "No, sir." The prosecutor apparently feeling the need of adding some decisive force to the opinion, followed his first inquiry with this question: "On the personal examination that you made of the woman and the foetus and the history of the case as you got it from her, what do you say now as to whether

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or not: there had been an abortion brought about by artificial means?" To this question the prisoner's counsel objected, as calling for hearsay and a privileged communication, and on the further ground that it involved "the history of the case" which had not been disclosed. The district attorney offered to disclose it, and put the question, what the girl said, which was objected to and excluded. Thereupon the court overruled the objection, and the witness answered: "I say an abortion has been produced." It is not possible on this state of facts to say justly that by the history of the case and the girl's statement was meant only her complaints of present pain and suffering. Nothing of the kind was suggested or pretended or could have been understood by court or witness or jury. Indeed on cross-examination the witness describes what he meant by the "clinical history of the case" saying, "I wrote down part of her statement and testified to it in the police court; and that included how she came there and what happened since she came to that house." So that the opinion of the expert that a crime had been committed, founded upon the narrative of the woman of previous facts, which narrative was itself inadmissible and remained undisclosed, was given to the jury. Necessarily it carried with it damaging inferences of what that narrative in fact was and drove the accused to the alternative of omitting all cross-examination as to the concealed basis of the opinion, or admitting inadmissible evidence.

We think there was error for which the judgment should be reversed, and a new trial granted, and the proceedings remitted to the Court of Sessions of Monroe county for that purpose.

All concur.

Judgment reversed.

SEIFERT v. CITY OF BROOKLYN.

(101 N. Y. 133.)

Municipal corporation—negligence—sewers.

A city established a system of sewerage, and built a sewer to drain a hitherto undrained district, which proved insufficient to carry off the sewage turned into it, and overflowed upon the plaintiff's land. With knowledge of this the city continued to attach lateral sewers to the main sewer, increasing the injury to the plaintiff's property. *Held*, that the city was liable. (*See note p. 671.*)

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ACTION for damages to premises by a sewer. The opinion states the case. The defendant had judgment at the trial, which was reversed at General Term.

John A. Taylor, for appellant.

Wm. C. De Witt, for respondent.

BUGER, C. J. The defendant in this case invokes the principle, exempting municipal corporations from liability for damages, occasioned through the exercise of judicial functions, by its officers as a defense to the action. The cases on the subject are by no means harmonious, and render it difficult to deduce from them any general rule founded upon principle, which clearly marks the line of distinction between liability and exemption therefrom. We have however been unable to find any case in this State going far enough to sustain the contention of the appellant.

Here certain officers of Brooklyn were constituted by statute commissioners of sewage and drainage with power to direct and frame a plan of drainage and sewerage for the whole city, upon a regular system, and upon the adoption of such plan to proceed to construct the drains and sewers, as the public health, convenience or interest should demand, or so much thereof as might be necessary. Chap. 521, Laws of 1857. By chapter 136, of the Laws of 1861, the commissioners were further empowered, whenever it became necessary, to construct a drain or sewer in any street or avenue for the purpose of preventing damage to property, or to abate a nuisance, and if the same was not in accordance with any plan already adopted, to construct temporary sewers in certain cases, in a manner to avoid such damages, or abate such nuisance. Under the authority conferred by these acts the commissioners, prior to the year 1868, established a certain drainage district covering a surface of nearly twenty-three hundred acres of land, and embracing within its limits a territory not theretofore drained, over the lands of the plaintiff, situated in the same district. and which contemplated the construction of a main sewer, through certain avenues and streets into which it was designed that lateral sewers intersecting the whole district should empty, as they should be from time to time thereafter constructed, for the convenience of the people desiring them.

In pursuance of this plan the main sewer referred to was built in 1868, and subsequent to that date various lateral sewers were from

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time to time, prior to the trial in 1884, constructed and connected with said main sewer. Within a short time after the completion of the main sewer, actual use demonstrated that it had not sufficient capacity to carry off the accumulation of water and matter turned into it, and the result was that at times of heavy rain and melting snow the collected sewage being obstructed in its flow, was forced through the man-holes and inundated the district in which plaintiff resides, inflicting serious injury to his property.

These inundations commenced nearly ten years previous to the trial and increased in frequency and severity as new lateral sewers were built and connected with the main trunk, until finally they occurred as often as eight or ten times a year and became well known to the officers of the corporation. Notwithstanding this fact the corporation has continued to build and attach lateral sewers to the main trunk and increased from year to year the evil produced by the defects of the original plan.

From this review of the facts, it would seem that the case is not brought within the principles decided in the authorities referred to by the appellant. The immunity of a municipal corporation from liability for damages, occasioned to those for whose benefit an improvement is instituted by reason of the insufficiency of the plan adopted, to wholly relieve their wants, or on account of a neglect of the municipality to exercise its power in making desired improvements and other like circumstances, is quite clearly established by the cases. The liability in such cases has been generally, if not always, predicated upon the duty, which the corporation owed its citizens to exercise the power conferred upon it to build streets, sewers, etc., for the convenience and benefit of its property-owners, and its exemption from liability was based upon the limitations necessarily surrounding the exercise of such power, and the judicial character of the functions employed in performing the duty. The question in *Mills v. Brooklyn*, 32 N. Y. 489, 495, as stated by Judge DENIO, was that "the grievance of which the plaintiffs complain is that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of certain capacity was built but it was insufficient to carry off all the water which came down in a rain-storm, and the plaintiff's premises were to a certain extent unprotected. Their condition was certainly no worse than it would have been if no sewer at all had been constructed." It was there held that the corporation was not liable. The case of *Smith v.*

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Mayor, etc., 66 N. Y. 295; s. c., 23 Am. Rep. 53, related to a sewer of sufficient capacity but which was temporarily obstructed by a deposit of mud and sand of which the corporation had no notice, and an overflow injuring plaintiff resulted. It was held that the corporation was liable for negligence alone, and that could not be predicated upon the facts established. *McCarthy v. City of Syracuse*, 46 N. Y. 194, was a similar case, and the same principle was there established, the city being charged with liability for an injury occurring through its neglect to repair a sewer after a lapse of time warranting the presumption of notice of the defect. In *Wilson v. Mayor, etc.*, 1 Denio, 595, 598; s. c., 43 Am. Dec. 719, the damages were occasioned by surface water naturally falling upon the plaintiff's premises but prevented from flowing off by the changes made in grading its streets by the city. It was held to owe no duty to its citizen to furnish drainage for the water naturally collected on his premises, and that no liability resulted from the change in the street grade made under statutory authority. It was further said that the power of the corporation "to make sewers and drains" is clear, but it is not their duty to make every sewer or drain which may be desired by individuals or which a jury might even find to be necessary and proper." *Lynch v. Mayor, etc.*, 76 N. Y. 60; s. c., 32 Am. Rep. 271, a case where the natural flow of surface-water and drainage was obstructed by the exercise of municipal power in grading, pitching and raising the public streets, and the city was declared free from liability for the damages incidentally occasioned to property in consequence of the obstructed drainage, and its omission to build drains for the convenience of the citizen. Its liability however in a case like the present was conceded in the opinion delivered by Judge EARL. In *Hines v. City of Lockport*, 50 N. Y. 236, the plaintiff was injured by defects in a public street. It was held that the duty resting upon the corporation of building, opening and grading streets, sidewalks, sewers, etc., was judicial, but that after they were constructed the duty of keeping them in repair was ministerial, and from an omission to perform that duty liability arose. *Urquhart v. Ogdensburgh*, 91 N. Y. 67, 71, was also a case of injury arising from a defective sidewalk, and the principle there laid down is in harmony with the cases above considered. We have thus referred to the principal cases cited by the appellant, and find no warrant in them for the doctrine that a municipal corporation, in the exercise of its discretionary or judi-

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cial power of determining when, where and how to make improvements, such as streets, sidewalks, sewers, etc., has the right to do so upon a plan, which substantially involves the appropriation by it of the property of a citizen to the public use.

We entertain no doubt as to the liability of the defendant for the damages occasioned by the defects of the sewer, and think it rests upon principles not conflicting with those announced in any reported case, but substantially in harmony with all of them. Municipal corporations have quite invariably been held liable for damages occasioned by acts, resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another whereby injury to his property had been occasioned. *Ball. & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S. 317. This principle has been uniformly applied to the act of such corporations in constructing streets, sewers, drains and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body and thus precipitated upon the premises of an individual, occasioning damage thereto. *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; also in 72 N. Y. 64; *Noonan v. City of Albany*, 79 N. Y. 470, 475; s. c., 35 Am. Rep. 540; *Beach v. City of Elmira*, 22 Hun, 158; *Field v. West Orange*, 36 N. J. Eq. 118, 120; s. c. on appeal, 37 N. J. Eq. 600; 45 Am. Rep. 670.

We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan, or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper. Wood Nuis., § 752. While in the present case the corporation was under no original obligation to the plaintiff or other citizens to build a sewer at the time and in the manner it did, yet having exercised the power to do so and thereby created a private nuisance on his premises, it incurred a duty, having created the necessity for its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate damage. *Phinizy v. City of Augusta*, 47 Ga. 260, 263; *Byrnes v. City of Cohoes*, *supra*.

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It is a principle of the fundamental law of the State that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. The immunity which extends to the consequences, following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where however the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences. *Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 195; s. c., 53 Am. Dec. 357.

It has been sometimes suggested that the principle illustrated in the maxim, "*salus populi est suprema lex*" may be applied to and will shield the perpetrators from liability for damages arising through the exercise of such power by a municipal corporation; but we apprehend that this maxim cannot be thus invoked. *Wilson v. Mayor, etc.*, 1 Den. 595; s. c., 43 Am. Dec. 719. The cases where such a doctrine can be properly applied, must from the very nature of the principle be confined to circumstances of sudden emergency, threatening disaster, public calamity, and precluding a resort to remedies requiring time and deliberation. Whart. Leg. Max. No. 89; *Mayor, etc., v. Lord*, 17 Wend. 285. It is suggested in the latter case that even in such an event, under the principles of the Constitution, the public would be liable for the damages inflicted. However this may be we are quite clear that the theory that a municipal corporation has the right in prosecuting a scheme of improvements to appropriate without compensation, either designedly or inadvertently the permanent or occasional occupation of a citizen's property, even though for the public benefit cannot be supported

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upon the principle referred to. If the use of such property is required for public purposes, the Constitution points out the way in which it may be acquired, when there is no such imminency in the danger apprehended as precludes a resort to the remedy provided, and the only mode by which it can be lawfully taken in such cases, is that afforded by the exercise of the right of eminent domain.

No question arises here over the distinction between actual or constructive damages, for the inundation of an individual's premises constitutes a trespass rendering the party occasioning the injury liable for the damages caused. *Scriver v. Smith*, 100 N. Y. 471; s. c., 53 Am. Rep. 224; Cooley Torts, 332; *St. Peter v. Denison*, 58 N. Y. 416; s. c., 17 Am. Rep. 258; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 168; *Eaton v. B. C. & M. R.*, 51 N. H. 504; s. c., 12 Am. Rep. 147.

We are also of the opinion that the cases holding that corporations acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by them of the authority conferred, have no application to the circumstances existing in this case, as those cases are confined to such consequences only as are the necessary and usual result of the act authorized.

The exercise of the authority conferred upon the commissioners of sewage and drainage did not require the injury to the property of the citizens of Brooklyn, which has been occasioned by the inundation complained of, and it was not the natural or necessary result of a proper exercise of their powers. Those injuries arose solely from the defective manner in which the authority was originally exercised, and the continuance of the wrong after notice of the injury occasioned. In such cases corporations have been uniformly held liable. *Radcliff's Ex'rs v. Mayor, etc.*, *supra*. Wood Nuis., § 752, says: "The rule being that no action lies against an individual or corporation for doing that which is authorized by the legislature, so long as the authority is properly exercised and not exceeded, but that liability does attach where the authority is negligently or improperly exercised, and where by a reasonable exercise of the power given either by statute or the common law, damages might be prevented, it is held that a failure to exercise such power is such negligence as charges them with responsibility for consequent damages." "As to the necessity for a sewer or its location or the system or plan of sewerage, the decision of the proper municipal is conclusive, because it is an exercise of a discretion

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reposed in them by the law, and consequently is not reviewable by the courts; but if in the selection of a location it unnecessarily creates a nuisance to public or private rights, it is responsible therefor." Citing *Franklin Wharf Co. v. Portland*, 67 Me. 46; s. c., 24 Am. Rep. 1; *Haskell v. New Bedford*, 108 Mass. 208, and many other cases. Dillon Mun. Corp., § 1051, lays down the rule where the injury is occasioned by the plan of the improvement, as distinguished from the mode of carrying the plan into execution, that there is not ordinarily, if ever any liability; but in that case he says: "There will be a liability if the direct effect of the work, particularly if it be a sewer or a drain, is to collect an increased body of water and to precipitate it on to the adjoining private property to its injury."

It follows from the principles stated that the order of the General Term should be affirmed, and judgment absolute ordered for plaintiff.

Order affirmed and judgment accordingly.

All concur.

Order affirmed.

NOTE BY THE REPORTER.—In *Johnston v. District of Columbia*, United States Supreme Court, April 19, 1886, the court by GRAY, J., said: "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured. The principal decisions upon the subject are collected in the briefs of counsel, and generally, if not uniformly, support these propositions. The leading authorities are the judgments of the Supreme Judicial Court of Massachusetts, delivered by Mr. Justice HOAR, in *Child v. Boston*, 4 Allen, 41, 51-53, and of the Court of Appeals of New York, delivered by Chief Justice DENIO, in *Mills v. Brooklyn*, 32 N. Y. 489, 495-500. In *Barnes v. District of Columbia*, 91 U. S. 540, 556, it was said that in *Rochester White Lead Company v. Rochester*, 3 N. Y. 468, 'the city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it. The work was well done; but the adoption and carrying out of the plan was held

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to be an act of negligence.' But this was clearly a mistake; for in that case the fact was distinctly found that the insufficiency of the culvert to carry off the water was owing, not merely to the smallness of its size, but 'to the want of skill in its construction;' 8 N. Y. 465; and the case was distinguished on that ground in *Mills v. Brooklyn*, 82 N. Y. 499. The question in judgment in *Barnes v. District of Columbia*, as well as in *Weightman v. Washington*, 1 Black, 89, was of municipal liability, not for an injury to property by a sewer, but for a personal injury to a traveller by want of repair in the highway, a question not now before us. In *Barton v. Syracuse*, 86 N. Y. 54, also cited for the plaintiff, the ground of action was not the plan of constructing the sewer, but the neglect to keep it in repair. In the present case, the only evidence offered by the plaintiff, which was excluded by the court, was evidence of what, in the case of a freshet, or of a great fall of rain, would be the consequence of the difference in level between the sewer in question and another sewer connecting with it; and this evidence, as the plaintiff's counsel avowed, was offered 'with the view of showing that the plan on which the sewer had been constructed by the authorities of the district had not been judiciously selected.' The evidence excluded was clearly inadmissible for the only purpose for which it was offered. As showing that the plan of drainage was injudicious and insufficient, it was incompetent. As bearing upon the question whether there was any negligence in the actual construction or repair of the sewer, or the question whether the sewer was so constructed as to create a nuisance upon the plaintiff's property, it was immaterial." See *Hardy v. City of Brooklyn*, 90 N. Y. 485; s. c., 48 Am. Rep. 182; *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Mayor, etc., v. Eldridge*, 64 Ga. 524; s. c., 37 Am. Rep. 89; *City of Denver v. Capelli*, 4 Colo. 25; s. c., 34 Am. Rep. 63; *Fair v. City of Philadelphia*, 83 Penn. St. 809; s. c., 32 Am. Rep. 455.

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(101 N. Y. 146.)

Landlord and tenant — nuisance — liability.

The defendant leased premises to a tenant, who by permission of the city constructed a vault under the sidewalk in front, with a coal-hole, in a proper and usual manner. By the wrongful act of a stranger, the stone supporting the cover of the hole was broken, and the cover turning when the plaintiff stepped on it, he fell and was injured. The defendant had no knowledge or notice of the defect. *Held*, that he was not liable.

ACTION for personal injuries by negligence. The opinion states the facts. The plaintiff had judgment below.

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W. F. MacRae, for appellant.

H. Morrison, for respondent.

FINCH, J. The defendants who appeal were shown to be the owners of premises which had vaults for the storage of coal extending under the sidewalk. The plaintiff was injured by a defect in the stone supporting the cover of the opening which arose while such premises were in the occupation of one Macpherson and others who were tenants having entire control of the premises. The defect was not one of original construction, but occurred through the act and interference of third persons engaged in building the elevated railway, and who broke the stone supporting the iron cover so that it turned under plaintiff's weight and occasioned the injury. We do not know at what time, prior to the accident, the defendants became owners. The building and the vault were constructed by Macpherson, and if, at the time, the appellants were owners, and responsible for the work actually done, it is still established that the vaults were built under a permit from the city and in accordance with that license. The coal-hole and its cover were safely and properly constructed, and in the usual and permitted manner. The case is not therefore within the doctrine of *Clifford v. Dam*, 81 N. Y. 52, and the kindred authorities cited by the respondent. In that case no permission or license from the municipality to make the excavation was either pleaded or proved, and the construction of the vaults was an unauthorized wrong and a nuisance, for the consequences of which the owner was responsible irrespective of the question of negligence. There was the same lack of special authority in most of the other cases to which we are referred. *Anderson v. Dickie*, 1 Robt. 238; *Dygeri v. Schenck*, 23 Wend. 445, 446; s. c., 35 Am. Dec. 575; *Congreve v. Morgan*, 18 N. Y. 75, 84; s. c., 72 Am. Dec. 495. Nor is the case one in which the owner or landlord has let the premises when in a defective and dangerous condition (*Davenport v. Ruckman*, 37 N. Y. 568), for the proof establishes no such ground of liability. The evidence does not disclose the precise legal relation existing between the occupants and owners. The former were tenants of some kind, although it does not appear that any rent was reserved or paid to the owners, or that the latter were ever in possession at all. On the contrary, Macpherson testified that from the time he built the houses, which

was in 1857, to the time of the accident he had the care and control of the premises both as owner and occupant. So that the recovery must stand, if at all, upon the sole ground that an owner, who has constructed vaults under the sidewalk lawfully and with due prudence and care, and transferred possession of the premises, if he ever had it, to third persons without covenant on his part to repair, is liable for a defect in the vault covering which afterward occurs through the interference of a stranger, although he may have had neither notice nor knowledge of the defect. The court went so far in the case as to charge that "if the plaintiff sustained injury by reason of the defective condition of said coal-hole and without contributory negligence, that said defendants Kilpatrick are liable in damages," to which there was an exception. The court was asked to charge "that notice of the alleged condition of the coal-hole must have been given to the Kilpatricks before they could be held liable as owners, when the possession was in Macpherson;" and that "if Macpherson was in the control and care of said premises, and deriving all the benefit therefrom, he alone is liable to the plaintiff." These requests were refused, and the appellants excepted. The basis on which the case was sent to the jury was still more clearly developed in the course of the charge. After stating the liability of the city as founded upon negligence, and involving notice, actual or constructive, of the alleged defect, the learned court added: "The law is a little more severe with respect to the owners of the premises for whose benefit this hole in the sidewalk has been authorized. It holds them to a stricter liability; a party injured by falling through any coal-hole in the sidewalk is not bound in the case of the owner of the premises to show that the owner had notice that the hole was out of repair. It appears, according to the current of decisions, that the owner of the premises is bound to see that the coal-hole and cover over it affords just as safe a passage to the wayfarer as any other portion of the sidewalk. Therefore, the question with respect to these defendants who are the owners of the property is simply how much they should be required to pay the plaintiff." The doctrine of the trial court was thus made extremely plain. It went upon the ground that the defect in the vault-stone was a nuisance for which the vault-owner was responsible, though out of possession and control, without the least knowledge of the fact, and when the defect was produced by the interference and misconduct of strangers.

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It may be that the condition of the coal-hole in the sidewalk became a nuisance while Macpherson was in possession, and after the stone was broken. *Swords v. Edgar*, 59 N. Y. 28, 34; s. c., 17 Am. Rep. 295. But if so, the party responsible can only be the person who either creates the nuisance, or suffers it to continue. The owners did not create it; that was the wrongful act of strangers. How can it be said that they suffered it to continue and so failed in their duty if they had no knowledge, actual or constructive, of the defect, and were out of possession and control? That can only be true on the theory that every owner of rented property in New York is bound to watch the sidewalks and coal-holes in front of his premises and protect them against unauthorized trespasses, and is bound to know when such a trespass is committed. We are aware of no case which goes so far as that. In *Swords v. Edgar*, *supra*, the premises were a pier upon which the public having business were invited to go, and which became dilapidated whereby injury arose. That condition was denominated a nuisance for which primarily the lessee in the actual occupation was liable; and he was held to be so liable independent of any covenant to repair and solely by force of the occupancy. But it was also held that the lessors were liable, and upon the ground that the pier was unsafe when dismissed, and they took a rent for it in that condition. The whole drift of the opinion shows that the landlord out of possession is not responsible for an after-occurring nuisance unless in some manner he is in fault for its creation or continuance.

His bare ownership will not produce that result. It was said in *Clifford v. Dam*, *supra*, that proof of authority from the municipality to build the vault would mitigate the act from an absolute nuisance to an act involving care in the construction and maintenance. In *Clancy v. Byrne*, 56 N. Y. 129, 133; s. c., 15 Am. Rep. 391, it was held that if the premises are in good repair when demised, but afterward become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or the public, unless he has expressly agreed to repair or has renewed the lease after the need of repair has shown itself. In the recent case of *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245, 248; s. c., 50 Am. Rep. 659, the circumstances under which the landlord may become liable are very fully considered with the declared result that "the responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and

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wrong complained of, he is liable; if not so guilty, no liability attaches to him." It is quite certain then that the plaintiff in this case was bound to establish some fault of omission or commission on the part of the landlord leading to the injury, and barely showing him to be owner is not enough. There was no fault of commission. That is conceded. There could be no fault of omission unless the landlord was bound to repair the defect, had actual or constructive notice of its existence, or was bound at his peril to discover and remedy it. No such duty rested upon him. It was the tenant's duty to repair the stone; it was his neglect which left it unsafe; and the landlord was not shown to be in any respect in fault. The charge made him liable barely from the fact of ownership, and was erroneous.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

WAKEMAN V. WHEELER & WILSON MFG. CO.

(101 N. Y. 205.)

Damages — prospectives — evidence.

The defendant agreed that if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of his agent about to be made, for every fifty machines so sold he should have the sole agency for the sale of said machines in that locality, and agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines to persons in different localities in Mexico under an agreement that the purchaser should be the sole agent for that locality. One of the orders defendant filled, the other it refused, and it refused to fill further orders from plaintiffs or their agents, and repudiated the contract. *Held*, that plaintiffs were not restricted to the damages sustained by reason of the refusal of the defendant to fill the orders actually given, but were entitled to recover such damages as they could show they had sustained by a total breach of the contract.*

Plaintiffs offered to prove that subsequent to the repudiation of the agreement, defendant established agencies in Mexico, and to show the number of machines sold through them. This was excluded. *Held* error.

But *held*, that the opinions of witnesses as to the value of the agreement, the profits which it or any agency established in pursuance of it, could produce, the damages realized, and as to the number of machines they could have sold, were properly excluded.

* See *Houston, etc., Ry. Co. v. Hill* (68 Tex. 381), 51 Am. Rep. 642.

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ACTION for breach of contract. The opinion states the facts. The defendant had judgment below.

Abram Wakeman, for appellant.

Wm. H Williams for respondent.

EARL, J. This action was brought to recover damages for the breach of an agreement made in the city of New York in February, 1878, which is set forth in the complaint as follows: "That if the plaintiffs shall succeed in placing, that is to say selling, fifty of the defendant's sewing machines to one firm or party in the Republic of Mexico during the next trip of their agent to that country then about to be made, they, the plaintiffs, for every fifty machines so sold shall have the sole agency for the sale of the defendant's sewing machines in that locality and its vicinity in that Republic, and the defendant should furnish to the plaintiffs machines at the lowest net gold prices." The defendant denied the agreement, but the jury found it substantially as alleged; and it is conceded that we must assume here that such an agreement was made. The plaintiffs at once entered upon the performance of the agreement, purchased a sample machine of the defendant, caused their agent to be instructed in its mechanism and management, and then sent him to Mexico. After reaching there he sold fifty machines to one Mead of San Luis Potosi, on his promise to Mead that he should be the general agent of the defendant for that locality and its vicinity. The order for the fifty machines was sent to the defendant and filled by it, and those machines were forwarded to Mexico and paid for. Shortly thereafter plaintiffs' agent made another sale of fifty machines for another locality in Mexico, and an order for those machines was sent to the defendant, which it absolutely refused to fill. Plaintiffs' agent procured another order for one machine and sent that to the defendant, which it also refused to fill; and then it refused to fill any further orders from the plaintiffs or their agents, and absolutely refused to perform and repudiated its agreement. Upon the trial of the action the plaintiffs made various offers of evidence to show the value of the contract with the defendant, the most of which were excluded. In his charge to the jury the judge held as matter of law that the plaintiffs could recover damages only for the refusal of the defendant to fill the orders actually given; and the

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plaintiffs' profits having been shown to be \$4 on a machine, the recovery was thus limited to \$204. They excepted to the rule of damages thus laid down, and the sole question for our determination is what, upon the facts of this case, was the proper rule of damages? Were the plaintiffs confined to the damages suffered by them in consequence of the refusal of the defendant to fill the two orders for fifty-one machines, or were they entitled also to recover the damages which they sustained by a total breach of the agreement on the part of the defendant? The judge limited the damages, as stated in his charge, because any further allowance of damages for the breach of the agreement would, as he claimed, be merely speculative and imaginary.

It is frequently difficult to apply the rules of damages and to determine how far and when opinion evidence may be received to prove the amount of damages; and the difficulty is encountered in a marked degree in this case. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved,

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they may form the measure of damage. As they are prospective they must, to some extent, be certain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages to determine the compensation to be awarded for the breach. When a contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of the courts and jurors.

These rules will be illustrated and limited by a few cases, some of which are quite analogous to this, to which attention will now be called. In *Masterson v. Mayor, etc.*, 7 Hill, 61; s. c., 42 Am. Dec. 38, NELSON, Ch. J., said: "When the books speak of the profits anticipated from a good bargain as matter too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. * * * But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. * * * It is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages." In *Bagley v. Smith*, 10 N. Y. 489; s. c., 61 Am. Dec. 757, it was held that one partner could maintain an action at law against the other for a breach of the partnership articles in dissolving before the period therein limited; that the damages in such an action are the profits which would have accrued to the plaintiff from the continuation of the partnership business and which are lost by the unauthorized dissolution, and that evidence of the actual gains of the partnership during its continuance is admissible as an element in determining the value of the prospective profits. JOHNSON, J., writing the opinion said: "The object of commercial partnerships is profit. This is the motive upon which men enter into the rela-

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tion. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the common grounds, and the amount of profits lost one of the common measures of the damages to be given upon a breach of contract," and that "it is very true that there is great difficulty in making an accurate estimate of future profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendant which has rendered it necessary." In *Taylor v. Bradley*, 39 N. Y. 129, the action was to recover damages for the total breach by the defendant of a contract to let a farm to the plaintiff for three years, each party to furnish part of the stock, seeds, tools, etc., the plaintiff to occupy and work the farm and have certain specified supplies for his family, and all proceeds to be divided equally, and it was held that the plaintiff was entitled to recover as damages the value of the contract, that is, what such a privilege of occupancy and working the farm, subject to the conditions of the agreement and under all the contingencies which were liable to affect the result, was worth. WOODRUFF, J., writing the opinion, said: "To my mind the only rule which will do justice to the parties is that the plaintiff is entitled to the value of his contract; he was entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it he must incur expense, submit to labor and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit." An opinion in the same case by Judge GROVER is reported in 4 Abb. Ct. of App. Dec. 263, in which he said: "An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of the contract; in other words, for the benefits and gains he would have realized from its performance and nothing more. It is sometimes said that the

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profits that would have been derived from performance cannot be recovered; but this is only true of such as are contingent upon some other operation. Profits which would certainly have been realized but for the defendant's default are recoverable. * * *

It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit would be derived at all. * * *

It is sometimes said that speculative damages cannot be recovered because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount;" that "the plaintiff will be fully compensated by recovering the value of his bargain. He ought not to have more, and I think he is not precluded from recovering this by any infirmity in the law in ascertaining its amount." In *Schell v. Plumb*, 55 N. Y. 592, it was held that an agreement by one party to support another during life is an entire continuing contract, and that upon a total breach thereof the latter may recover full and final damages, not only the expenses of support up to the time of trial, but all the prospective expenses during life, and that the Northampton tables are competent evidence as to the probable duration of life. GROVER, J., writing the opinion, said: "The counsel for the appellants insists that such cannot be the rule, for the reason, as he insists, that it is impossible to ascertain the damages, as the duration of life is uncertain, and a further uncertainty arising from the future physical condition of the person. * * *

It may be further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain notwithstanding the uncertainty of the duration of his life and other contingencies which may probably affect the amount." In *Dennis v. Maxfield*, 10 Allen, 138, it was held that if a written contract by which the

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master of a whaling ship is employed provides that he shall have a certain "lay" in the proceeds and also an additional compensation depending upon the amount of the cargo, and he is wrongfully discharged by the owners before the expiration of the contract, he may recover as a part of his damages his share of the earnings of the ship both before and after his removal. BIGELOW, C. J., writing the opinion and speaking of the earnings of the ship, said: "They are undoubtedly in their nature contingent and speculative and difficult of estimate, but being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of copartnership that the profits of the contemplated business were uncertain, contingent and difficult of proof, and could it be held for this reason that no recovery could be had in case of breach of such contract? Or in an action on a policy of insurance on profits, would it be a valid defense in the event of loss to say that no damages could be claimed or proved because the subject of insurance was merely speculative, and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity?"

In *Simpson v. London, etc., R. Co.*, 1 Q. B. D. 274; s. c., 16 Eng. Rep. 330, the plaintiff, a manufacturer, who was in the habit of attending agricultural shows to exhibit samples of his goods, and made profit by the practice, delivered them upon a show ground where he had been exhibiting them to the receiving agent of the defendant, a railroad company, to be carried by a particular day to a show ground at another place where a similar show at which he intended to exhibit was to be held; but nothing was expressly said about the intention of the plaintiff. The samples did not arrive until after the day stipulated and when the show was over; and the plaintiff lost several days in going to meet them and waiting for them. In an action for the breach of a contract a verdict was given for damages which included a sum for loss of time or loss of profit; and it was held that the purpose of the plaintiff to exhibit was within the contemplation of the parties to the contract; that the plaintiff was entitled to the damages, on the ground that loss of profit was a natural and probable result of the failure of that purpose; and that no evidence was necessary of prospect of making

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profit at the particular show in question. COCKBURN, C. J., said: "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all." MELLOR, J., said: "As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves." FIELD, J., said: "As to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost a sufficient answer is that it must be assumed that the plaintiff would make some profits." In *Jaques v. Millar*, 6 Ch. Div. 153; s. c., 22 Eng. Rep. 728, the plaintiff agreed with the defendant to take a lease of premises belonging to defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of the defendant's willful refusal to fulfill his agreement, the plaintiff was unable for fifteen weeks to commence his trade; and it was held that in addition to judgment for specific performance of the agreement, damages must be awarded in respect to plaintiff's loss of profits from his work during the fifteen weeks. To the same effect are the following cases: *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13; *Mitchell v. Read*, 84 N. Y. 556; *Danolds v. State*, 89 N. Y. 36; s. c., 42 Am. Rep. 277; *Hoy v. Grenoble*, 34 Penn. St. 9; *Garsed v. Turner*, 71 Penn. St. 56; *McNeil v. Reid*, 9 Bing. 68; *Fletcher v. Tayleur*, 17 C. B. 21.

In conflict, we think, with these authorities is the case of *Howe Machine Co. v. Bryson*, 44 Iowa, 159; s. c., 24 Am. Rep. 735. In that case a party made a contract with the general agents of a sewing machine company, by the terms of which he was to rent a room, provided himself with a team, and furnish other necessary means for the sale of machines, and devote his time thereto, the agents agreeing to furnish him with all the machines he could sell at a price twenty-five per cent below the retail rate. The party performed his undertaking but the machines were not supplied as agreed, and it was held that the measure of damages was the value of the time lost as the result of the breach, without reference to the profits which might have been realized if the contract had been performed. Two of the five judges dissented, and we concur with them.

Under the Civil Damage Act, chapter 646 of the Laws of 1873,

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and under the acts allowing the next of kin of one whose death has been caused by the wrong or carelessness of another to recover damages for such death, the amount of damages is exceedingly uncertain, problematical and contingent, and yet it must be left to the determination of a jury upon such facts as can be proved. *Etherington v. R. R. Co.*, 88 N. Y. 641; *Houghkirk v. D. & H. C. Co.*, 92 N. Y. 219; s. c., 44 Am. Rep. 370.

It is quite clear that the rules of damages having the sanction of these authorities were violated upon the trial of this action. The plaintiffs had the right under their agreement to establish agencies for the sale of defendant's machines anywhere in Mexico where they could sell fifty machines. An agency, when thus established was to be exclusive, and was to have some permanency. It could not be broken up at the will of the defendant without some default on the part of the plaintiffs. That the agreement had some value to the plaintiffs is very clear, and of that value, whatever it was, they were deprived by the act of the defendant. It is quite true that that value, or in other words, the damage caused to the plaintiffs by the total breach of the agreement by the defendant, is quite uncertain and difficult to be estimated. But the difficulty is not greater than it was in several of the cases above cited. There are some facts upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice in such a case. The agent whom plaintiffs sent to Mexico was apparently intelligent, capable, well acquainted with Mexico. Machines could be delivered there, for about \$30 per machine, and could then be sold at retail for about \$125. The profit of the plaintiffs on each machine was about \$4. Plaintiffs' agents readily made sales of one hundred and one machines, and were about to make other sales. One of defendant's agents subsequently sold in a single city twenty machines in six months, at \$155 each. The plaintiffs had established two agencies, and to the value of such agencies at least they were entitled. Mead, who had one of the agencies, testified, that he had made arrangements with several parties to sell the machines; that he had all the facilities for carrying on an extensive and profitable business, and was well acquainted with the country. The population of several of the Mexican cities in which plaintiffs' agent was engaged in establishing agencies was shown. From all these and other facts proved it cannot be doubted that the plaintiffs suffered damages to at least sev-

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eral hundred dollars, and they should not have been deprived of the damages which they made to appear because they could not make clear the full amount of their damages. All the facts should have been submitted to the jury with proper instructions, and their verdict, not based upon mere speculation and possibilities but upon the facts and circumstances proved, would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will admit. In 1 Sutherland Damages, 113, it is said: "If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired, and to show the whole situation which is the foundation of the claim and expectation of profits so far as any detail offered has a legal tendency to support such claim."

The trial judge also erred in excluding evidence which would have given the jury some aid in estimating the damages. The plaintiffs made persistent efforts to show that subsequently to the repudiation of its agreement, the defendant established agencies in Mexico, and the number of machines sold through such agencies. This evidence was upon the objection of the defendant excluded. We think it should have been received. It would have shown the market for these machines there, and the facility with which they could be sold, and would have had some tendency to show the extent of business the plaintiffs could have done there and the value of their agreement.

We think the opinions of witnesses as to the value of the agreement, as to the profits which it or any agency established in pursuance of it could produce, as to the damages plaintiffs realized, and as to the number of machines they could have sold, were properly excluded. This was not a case for expert or opinion evidence. There was no certain basis of facts proved, or facts assumed upon which an opinion could be based. The conflicting opinions of interested witnesses, selected because of their favorable opinions, instead of aiding the jury would probably add to their embarrassment. The safer rule in all such cases is to exclude opinions and receive the facts, and then leave the matter for the determination of the jury. They may not have any certain basis upon which to rest their judgments, but that cannot be helped. They are supposed to be disinterested and must apply their experience and common sense to the facts proved and reach the best results they can. Our views

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as to opinion evidence were so fully expressed in *Ferguson v. Hubbell*, 97 N. Y. 507; s. c., 49 Am. Rep. 544, that they need no restatement here. We have no means of knowing that the views expressed by Judge WOODRUFF in *Taylor v. Bradley*, *supra*, as to the proof of the damages, by the estimates of witnesses, were coincided in by his associates. They were not necessary to the decision of that case, and we are not prepared to assent to them. In *Mitchell v. Reed*, *supra*, the opinions of witnesses as to the value of certain leases, based upon certain facts assumed, were received. No question was made at any stage of that case that the opinions were not competent. The rule as to opinion evidence was liberally applied in that case, and we are inclined to think properly. There was some certain basis for the foundation of opinions by experts in reference to the worth of property which had salable value.

We have not considered the bearing of the statute of frauds upon this case, as no point or reference to it was made upon the trial.

Our conclusion therefore is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

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(101 N. Y. 324.)

Jury — rejection of competent juror — inhabitant of city.

The charter of the defendant city provided that in an action to which the city is a party no person shall be deemed an incompetent juror by reason of his being an inhabitant of the city. In impanelling a jury in this action, the plaintiff, against the defendant's objection, excused twelve jurors drawn, on the ground that they were inhabitants and tax payers of the city, and they were set aside. A jury was obtained, and judgment went against the city. *Held*, that the ruling was fatal error.

ACTION for damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

William J. Roche, for appellant.

James Lansing, for respondent.

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ANDREWS, J. This action was brought to recover for injuries sustained by the plaintiff from the negligence of the defendant in failing to keep Congress street in the city of Troy in safe condition for travel, and resulted in a verdict for the plaintiff for \$1,800. It appears that upon the impanelling of the jury, the plaintiff "excused" eight jurors drawn from the regular panel, residents of the city of Troy, upon the ground that they were interested in the result of the action, to which proceeding the city attorney objected on the ground that residents and tax payers of the city are not disqualified as jurors in city cases, if otherwise competent. The court overruled the objection and held that all such jurors were disqualified, to which ruling the attorney for the defendant excepted. Thereafter four additional jurors, residents of the city, were drawn and the same proceeding was had, and they were likewise excluded. The jury box was filled from other names in the panel, and none of the jurors who sat were objected to or challenged. It is not claimed that the jurors excluded by the ruling of the court were interested except as tax payers of the city. By the rule of the common law the inhabitants of a municipality, or the members of any body politic, were incompetent to sit as jurors in a case in which the corporation was a party. They were deemed to be interested, and such interest was a good cause of principal challenge. Coke Littleton, 157, a, b. The common law has been modified in this State by general statutes making the inhabitants of a town or county competent jurors in suits brought by or against such town or county (1 R. S. 357, § 4; 1 R. S., 384, § 4; 2 R. S. 420, § 58), and as to the inhabitants of cities, by special provision, inserted in nearly all cases, in the charters of incorporation. The charter of Troy, enacted in 1816, provides: "That upon the trial of any issue, or upon the taking or making of any inquisition, or upon the judicial investigation of any facts whatever, to which issue, inquest or investigation the mayor, recorder, aldermen and commonalty of said city are a party, or in which they are interested, no person shall be deemed an incompetent juror by reason of his being an inhabitant, freholder or freeman of the said city." Chap. 1, § 16, Laws of 1816. This provision has never been repealed or amended, and was in force at the time of the trial of this action. The ruling of the learned trial judge excluding from the jury the residents of Troy on the ground of interest, was in contravention of this explicit provision of law and was plainly erroneous.

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The question presented is, whether the error of the judge is ground for the reversal of the judgment. The proceeding on the part of the plaintiff was in substance a challenge. It was so treated by the attorney for the city and by the court. The court ruled that residents of the city were legally disqualified as jurors, and excluded them on that ground alone. The right of a party to except to a determination of the court upon a challenge to a juror, and to have such determination reviewed on appeal is expressly given by the Code (§ 1180). This section recognizes the determination of a challenge as involving a legal right, which may be reviewed, and if erroneous, set aside. The General Term disposed of the question on the ground that the rejection of a competent juror was not ground of error, where the jurors who actually try the case are competent. We cannot assent to this view. In our judgment the adoption of this principle would seriously imperil the system of jury trial and lead to practices which the statutes regulating the drawing of jurors were designed to prevent. The main purpose of the statutes for the drawing and selection of trial jurors is the securing of a fair and impartial jury. To this end, provisions are made, which if followed prevent the selection of a jury either by the court, or the officers of the court, or by either of the parties to the action, and exclude from the jury box all jurors not indifferent, or who for any reason are disqualified to act as jurors; while at the same time they secure to the parties the advantage of a jury constituted by lot from all the qualified jurors undrawn on the panel. By the Stat. 3 Geo. II, § 11, "for the better regulation of juries," it is provided that the first twelve persons drawn, and appearing, and approved as indifferent, should be the jury to try the cause. This provision was incorporated into the Revised Laws of 1813 (1 R. L. 331, § 20), and into the Revised Statutes (2 R. S. 420, § 61), and was re-enacted in the Code of Civil Procedure (§ 1166), without any substantial change. The section of the Code is in this language: "The first twelve persons who appear as their names are drawn and called, and approved as indifferent between the parties, and not discharged or excused, must be sworn; and constitute the jury to try the case." Sections 1032 and 1033 enumerate causes for which jurors may be discharged or excused. The language of section 1166 is mandatory. Blackstone refers with just admiration to the safeguards thrown around the selection of a jury by the English statutes, and observes that they are admirably designed for the

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avoiding of frauds and secret management, by electing the twelve jurors out of the whole of the panel by lot. (2 Bl. Com. 365.) It is said that no injury resulted to the defendant from the erroneous exclusion of the city jurors, since a competent jury actually tried the case. The court cannot say that the trial would have resulted differently if the city jurors had not been excluded. On the other hand the contrary cannot be affirmed. It is certain that except for the erroneous ruling the jury would have been differently constituted. Jurors differ in intelligence, judgment, and fitness to act as jurors. It is we think the legal right of a party to have the jury selected from the competent names in the jury box, and that the range of selection shall not be limited by excluding without cause competent jurors from the panel. It cannot be doubted that if an incompetent juror had been admitted against the objection of the defendant, the judgment would be set aside, and yet in many cases it would be impossible to show any actual injury. A person not a resident of the county, or over sixty years of age, or without the requisite property qualification, is not a competent juror (Code, § 1027), but it would we conceive be no answer to an exception taken to his admission, that no actual injury was shown to have resulted. The violation of the legal right of the party to have the case tried by competent jurors would be conclusive. The error in this case was in improperly rejecting competent jurors. The court added a disqualification, not only not found in the statute, but which the statute declares shall not constitute a disqualification. The law allows in a civil case two peremptory challenges to each party. The action of the court was equivalent to allowing the plaintiff fourteen peremptory challenges, because it excluded from the jury without adequate cause upon the motion of plaintiff, fourteen jurors presumably competent. If the court had in form allowed the plaintiff more than two peremptory challenges, would it be an answer to an exception, that nevertheless there was no legal injury, since a competent jury was subsequently impaneled? We think the error of the court in excluding the city jurors is available to the defendant on this appeal. The learned trial judge doubtless decided the point under the misapprehension that the case was governed by the common law, without having in view the statute of 1816. But the charter is declared on its face to be a public act, and the judge is presumed to have had notice of its provisions. It does not appear whether his attention was specially called to the provision in section 16, but

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the counsel for the plaintiff took the objection to the jurors specifically on the ground that as residents of Troy they were interested, and so disqualified, and the defendant's counsel insisted that they were not disqualified for that reason, and the court ruled the point for the plaintiff. We think he must bear the consequences of the error, and that he cannot escape by charging the defendant with a violation of duty in omitting to call the attention of the court to the provision of the statute of 1816, which so far as appears, may not have been known to him at the time. The judgment should be reversed. The statute makes elaborate provision for securing an impartial jury. It provides that the first twelve jurors drawn, who are indifferent and not discharged or excused, shall constitute the jury. The law prescribes the qualifications of the jurors. The court cannot add to or detract from them. It cannot itself select the jury, directly or indirectly. It cannot in its discretion, or capriciously, set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left. If this is done, a legal right is violated, for which an appellate court will give redress. The jury system, to be successfully administered, requires not only absolute impartiality in fact, in the drawing of jurors, but such an adherence to forms and methods of procedure as will secure public confidence and prevent any suspicion of improper or unfair dealing.

We have not lost sight of the cases holding that a mere irregularity on the part of ministerial officers in the selection and drawing of jurors is not ground of error, unless it appears that it operated to the prejudice of the party. *Friery v. People*, 2 Keyes, 424, 425; *Ferris v. People*, 35 N. Y. 125; *People v. Ransom*, 7 Wend. 417. But the erroneous exclusion by a judge on the trial from a particular panel, of a class of persons regularly drawn, on the ground of incompetency, stands we think upon a different principle and is governed by different considerations.

The judgment should be reversed.

Judgment reversed.

All concur.

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PEOPLE V. COURT OF OYER AND TERMINER.

(101 N. Y. 245.)

Contempt — juror going to see locality in question

During a trial for assault with intent to kill, one of the jurors, without permission, went alone to the premises where the assault was committed, for the purpose of acquainting himself with them. *Held* not a contempt.

CERTIORARI to review a sentence for contempt. The head-note shows the point. The relator was discharged below.

DeLancey Nicoll, for appellant.

John Vincent and *Ira Shafer*, for respondent.

FINCH, J. The occasion and result of proceedings for contempt furnish a clear and well-defined line of division separating them into two classes which have become somewhat mingled and confused by the use of a fixed but ambiguous nomenclature. *In re Watson*, 3 Lans. 408. There may prove to be rare and exceptional cases which do not easily fall within either class, or some which so commingle the characteristics of both as to make their location doubtful and difficult; but in the main the division is exhaustive and clear. In one class are grouped cases whose occasion is an injury or wrong done to a party who is a suitor before the court, and has established a claim upon its protection; and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety, and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled which are essential to his particular rights of person or of property. This clearly appears from the mode of enforcing the suitor's remedy prescribed by the statute. Code Civ. Pro., §§ 2284, 2285. A fine may be imposed to indemnify his actual loss. Where such is not shown the fine must not exceed his costs

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and expenses and \$250 in addition thereto, and in both cases be paid over to the suitor. The imprisonment, where the act or duty can yet be performed, must end with the performance of the act and payment of the fine; but if the act or duty cannot be performed, then the imprisonment must not exceed six months and until the fine be paid. In this last provision there is a trace of the element of punishment, but it is for the violation of the private right of the party and to check similar violations in the future, and has no respect to public offenses or the vindication of public wrongs. The people may be such a party, but only when, like individuals, they are seeking a civil right or remedy which the misconduct complained of tends to defeat or impede; in other words, when they stand in the attitude of private suitors, seeking to enforce their private rights. If in this class of cases there exist traces of a vindication of public authority they are but faint, and utterly lost in the characteristic which is strongly predominant of protection to private rights imperilled or indemnity for such rights defeated.

These cases have been usually described as proceedings for the enforcement of civil remedies, and more briefly as civil contempts; and because the great volume of instances occur in the progress of civil actions; but they may also occur in criminal actions or proceedings, as we shall presently see, and constitute then what I imagine the learned counsel for the appellant had in his mind when he spoke of "*quasi* civil contempts." If we describe this first class of contempts as private contempts because their occasion and result is, primarily and in the main, the vindication of private rights, we shall avoid confusion or misapprehension.

The second class of contempts consists of those whose cause and result are a violation of the rights of the public as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant. In these cases if a fine is imposed its maximum is limited by a fixed general law, and not at all by the needs of individuals; and its proceeds when collected go into the public treasury and not into the purse of an individual suitor. The fine is punishment rather than indemnity, and if imprisonment is added, it is in the interest of public justice and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily these contempts in their origin and punishment partake of the nature of crimes, which are violations of the public law, and

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end in the vindication of public justice; and hence are named criminal contempts. As described in the statute, an element of willfulness, or of evil intention, enters into and characterizes them. They are a disturbance of the court which interferes with its performance of duty as a judicial tribunal; willful disobedience to its lawful mandate; resistance to such mandate willfully offered; contumacious and unlawful refusal to be sworn as a witness, or to answer a proper question; and publication of a false and grossly inaccurate report of its proceedings. These cases and their punishment are placed under the head of "general powers of the courts and their attributes;" and they very evidently relate to public offenses tending to cast discredit upon the administration of public justice, and having no reference to the particular rights of suitors. But here again we find that they occur as well in civil as in criminal actions, and so for convenience, we may speak of them in view of the present classification, as public contempts, although the established legal nomenclature must remain unchanged.

We have then two distinct classes, private contempts and public contempts, with which we are to deal for the purposes of this case. Both were known to and recognized by the common law, and the courts were held to possess an inherent power of punishing by process of contempt any disregard of their authority, both for the benefit of their suitors, and for the protection of their own order and dignity. Necessarily the common-law power was very broad and vested large discretion in the courts. These became in some instances both accuser and judge, and this was especially so where the contempt was of a public nature, and no private person stood as complainant and sufferer. When the Revised Statutes were enacted an evident effort was made to codify the law of contempt and bring it within definite and fixed rules (1 R. S. 534, § 1; 1 R. S. 278, § 10); and the effort plainly recognized the difference between the two classes. The first, or private contempts, were described as those "by which the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded or prejudiced in the following cases." After a very careful and specific enumeration it was still recognized that in the multitude of private rights other and unnamed cases might occur, and to meet that emergency subdivision 8 was added, which retained the power in "all other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts

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of record to enforce the civil remedies of any party to a suit in such court or to protect the rights of any such party." By this clause the common-law right as to private contempts was preserved outside of and beyond the statute enumeration, and this was deemed safe and prudent because in cases affecting only private rights and wrongs done merely to the suitor the courts would be under little or no temptation to unduly strain or exercise their power. But the situation was entirely different as to public contempts. As to these the court contemned was the court which adjudged and punished, and that summarily and without the intervention of a jury. Here precise limitations were needed, and any shred or remnant of undefined common-law power was deemed dangerous. And so the legislature decreed that "every court of record shall have power to punish as for a criminal contempt persons guilty of either of the following acts *and no others*." Observe the difference in the two acts founded upon the inherent difference between the two classes. The private or civil contempt might go beyond the statutory enumeration and include also what was usual or permissible at common law. But the public or criminal contempt was precisely defined and barred in by the statute enumeration. The phrase "and no others" implies that there were or might be other and non-enumerated offenses, answering the description or characteristics of public contempts, which, but for the statute, might be so deemed and punished; and all these it was affirmatively intended to shut out, at least until subsequent legislation should let them in. So that for the criminal contempt, we may look only to the statute, while for the private or civil contempt we may resort, if need be, to the common law. These two statutes have been substantially copied into our Codes (Code of Civ. Pro., §§ 8, 14; Penal Code, § 143). Outside of the criminal contempts enumerated there were very many offenses of that general character which could not be so punished, but were reached by making them misdemeanors and giving the culprit a trial before a jury; and any omitted case not covered by one or the other of these remedies may be easily met by further legislation. Other provisions of the Codes, to which we have been referred, may have been enacted without keeping this classification in view, but if some confuse, none of them destroy it. By section 243 of the Code of Criminal Procedure a grand juror may be challenged as a minor, an alien or insane, or as prejudiced and not impartial toward the party challenging, and by section 243 his attempt

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to serve is punishable as a contempt. It is not called a criminal or public contempt, and is not made such, but in its nature was evidently deemed an act which rather violated the private or particular right of the party challenging, and so belonged as it was left by the Code in the class of private contempts occurring in a criminal action. By section 344 and those which follow a prisoner may apply to remove his case from a court in which the indictment is pending, and for that purpose may apply to a judge for a stay, but if the application is denied, a further appeal to another judge is forbidden and made punishable as a contempt. Here again the prohibited act respects primarily the private right of the accused, and is classed as a simple contempt and not denominated criminal. But since it does also respect public justice, and there is no suitor to be indemnified, it hardly belongs where it is placed, and some consciousness of this is evidenced by the further provision of the section that it shall also be punished as a misdemeanor. Section 619 makes disobedience to a subpoena, or refusal to be sworn or testify, a criminal contempt, and section 635 extends that to a conditional examination.

It seems to me thus entirely clear that an act which is not a private contempt, and is not enumerated among criminal contempts, is not a contempt at all, although it may be and very often is punishable as a misdemeanor. There is no difficulty about the statute, 2 R. S. (Edm. ed.) 759, § 14, to which the learned district attorney refers us, as making all contempts in civil cases applicable to criminal trials. The private contempts are so applicable when they in fact occur. The statute in question accomplished nothing except to make the form and manner of proceeding adopted to punish contempts in civil cases, apply to contempts on criminal trials, so far as in their nature applicable. It did not change the definition of contempts or destroy or confuse the statute classification. *People v. Restell*, 3 Hill, 289, 295. The extended application of the statute was intimated in *People v. Hackley*, 24 N. Y. 74, 78, but the essential characteristics of contempts were not confused or altered.

There remains to us the inquiry whether the act of the juror in this case was a contempt at all. It is conceded that it was not a criminal contempt, because not one of those enumerated in the statute. It certainly was not a private or civil contempt, for it invaded no right of an individual suitor before the court, and involved no ques-

tion or duty of indemnity to an individual litigant. On a criminal trial a verdict of acquittal was rendered which shocked the sense of justice and aroused the indignation of the learned trial judge. It then appeared that Munsell, one of the jurymen, had gone to the scene of the affray for the purpose of acquainting himself with the locality. It is not alleged that he obtained any information. For that act he was committed for a contempt. On the face of the order it is recited that he willfully disobeyed the command of the court. If that was true there was a criminal contempt; but it is here conceded not to be true, and that no order of the court was disobeyed. Certainly, this was not a private or civil contempt. It is said the people were a party and their rights were invaded and so were to be protected. But the people were the public, and their rights were the rights of public justice and the offense, if one at all was a public offense. The phrase "to protect the rights of any such party" means a party entitled to "civil remedies" in his action, and wielding the power of the court for his private and personal benefit. It is true that in every criminal action the people as parties plaintiff have rights to be cared for in its progress. But these rights are generally of a public character and respect the protection of society. As in private contempts there are traces of a vindication of public authority, so in public contempts there are indications of private rights, but as in the other instance, lost and overwhelmed in the predominating characteristics of the class. Upon a criminal trial there is often behind the people an individual complainant who has suffered in his rights of person or of property, and more or less interested in the prosecution; but he is not permitted to be a party; he must go elsewhere to redress his wrong; and it is not his right which is being enforced, but that of public justice with a view to the public safety. And the logical result of this must be that on a criminal trial, a disrespect to or defiance of the court, which does not injure the private right of the accused, and calls for no vindication on his behalf is either a criminal contempt, or a misdemeanor, or both, but cannot be a private or civil contempt.

The distinction between the two classes of contempts was observed very soon after the statutes were passed.

In a civil action decided in 1831, which the appellant cites, a party broke open books sealed up in the master's office, which was a contempt at common law. The chancellor said: "Upon my first examination of the Revised Statutes I was inclined to think that

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the section which defines criminal contempts had deprived the court of the power of punishing the improper conduct;" and then he holds that it was a civil or private contempt within subdivisions 2 and 8 because it was a case in which the rights of the adverse party were materially involved.

We need not determine whether this juror was guilty of any offense whatever, since if we should assume that he was, for the sake of the argument, and that what he did was unlawful and prohibited, his act would have been a criminal contempt but for the statute bar. It would have invaded no private right; no right of a mere suitor seeking a personal remedy for a wrong done him; but would have struck at public justice and the vigor and honesty of its administration; have been a disrespect to the court and a defiance of the public law, causing to miscarry a public prosecution. It is very certain that the learned trial court so understood and so dealt with it. The punishment adjudged was precisely the maximum of that fixed for criminal contempts both as to the fine and the imprisonment. There was no trace of indemnity to the people as plaintiffs. Their costs and expenses were not ascertained or considered, or sought to be reimbursed. Nothing was meant but punishment for a public offense to be dealt with as such. The court said the extreme punishment permissible was inadequate, but should be imposed. But thirty days in jail and \$250 fine was not the limit if this was a civil or private contempt. In that case both might have been greater. And in imposing the penalty upon the juror the court described it as "punishment for his misconduct." If there was misconduct the act would have been a criminal contempt but for the prohibition lodged in the words "no others." Those words are meaningless on the theory of the prosecution. For if the people are to be deemed like private suitors, and whenever their rights are infringed there may be a *quasi* civil contempt, and that punished as was this juror, precisely as if guilty of a criminal contempt, the whole statute and its prohibition is a complete absurdity. The roads are open on both its flanks.

We cannot so construe it. We think the General Term were right in saying that this juror could not be punished for a contempt.

The order of the General Term should be affirmed.

All concur.

Order affirmed.

WELSH V. WILSON.

(101 N. Y. 254.)

Negligence — obstructing sidewalk with skids.

Defendant, for the purpose of removing merchandise from his store in the city of New York, laid skids from a truck across the sidewalk to the steps. They had been there a few minutes when the plaintiff, coming along the sidewalk attempted to pass around the skids by the steps, and slipped upon the steps and was injured. *Held*, that defendant was not bound to see that the steps were in an absolutely safe condition for travel; and that the plaintiff was not entitled to recover.*

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

John Sedgwick Bangs, for respondent.

Wm. G. Cooke, for appellant.

EARL, J. The defendant, desiring to remove two large cases of merchandise from his store in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store. It would have taken not more than five minutes to remove the cases from the store to the truck. After the skids had been there about two minutes, the plaintiff came along the sidewalk, and seeing the skids in her pathway turned toward the store and attempted to pass around the skids, and in doing so she slipped upon the steps and was injured; and then she brought this action to recover damages.

The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street, in a populous city, must have such a right, to be exercised in a reasonable manner, so as not to unnecessarily incumber and obstruct the sidewalk. When the plaintiff found this obstruction in her pathway, she had the option, either to wait a couple of minutes, or to cross the street and pass upon the other sidewalk, or to pass around the truck in the street, or to take the way she selected. The defendant was under no obligation to furnish her a safe passage-way around the

* See *Matthews v. Kelsey* (58 Me. 56), 4 Am. Rep. 248.

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obstruction. *People v. Cunningham*, 1 Denio, 524, 530; s. c., 43 Am. Dec. 709; *Commonwealth v. Passmore*, 1 Serg. & Rawle, 219; *People v. Horton*, 64 N. Y. 610.

The defendant owed the plaintiff no duty to see that its steps were in an absolutely safe condition for travel, and it does not appear that they were dangerous under such circumstances as to charge him with carelessness, even if that would have been sufficient to impose any liability upon him in this case.

We think the judgment should be affirmed.

Judgment affirmed.

All concur, except RUGER, C. J., not voting.

PEASE V. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

(101 N. Y. 267.)

Carrier — ejection of passenger for non-payment of fare — offer to pay.

A railway passenger presenting an invalid ticket and refusing to pay his fare, the conductor proceeded forcibly to eject him from the car at a crossing of another railroad, where the train had stopped for a moment in compliance with a statute, and where passengers were in the habit of getting on and off. The passenger resisted, and twice during the struggle he offered to pay the fare, but it was refused, and he was put off. *Held*, that the ejection was lawful.

ACTION for an unlawful ejection from a railroad train. The opinion states the case. The plaintiff had judgment below.

Hamilton Odell, for appellant.

Thomas M. North, for respondent.

RUGER, C. J. The court charged the jury as matter of law, that if the train bearing the plaintiff had stopped at a station, and before it started again he offered to pay his fare, any subsequent act of the defendant committed in the effort to expel him was unlawful, and rendered it liable for damages occurring therefrom. To this charge there was an exception.

* See *Swan v. Manchester, etc., R. Co.* (132 Mass. 116), 43 Am. Rep. 432; *Hofbauer v. Delhi, etc., R. Co.* (52 Iowa, 842), 35 Am. Rep. 578.

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We think this direction was erroneous. The facts taken in their most favorable aspect for him showed that the plaintiff boarded the defendant's train at Hoboken, intending to ride to Montclair. When the conductor reached him in the process of collecting fare, the plaintiff exhibited a ticket purporting to be good for a passage on defendant's cars from Montclair to Hoboken. This the conductor refused to accept and requested the plaintiff to pay his fare. He refused and demanded a passage on the ticket. The conductor told him he should be obliged to put him off unless he paid his fare. The plaintiff then replied, "I will sue the company if you put me off." An issue was thus deliberately and intelligently made between the parties. The conductor called for assistance, and a brakeman and baggageman appeared and began the removal. The plaintiff resisted with force the effort to remove him, and continued the struggle without cessation from his seat until he was finally landed on the track outside the car.

At the time the plaintiff reached the car door, and while he was near it on the platform, he stated to those engaged in ejecting him that he did not want to be put off, and would pay his fare; but notwithstanding this offer the expulsion continued and plaintiff was ejected.

It is not disputed but that the ticket tendered was insufficient to entitle the plaintiff to a ride from Hoboken to Montclair, nor but that the conductor was justified in ejecting him from the cars for non-payment of fare; but it is claimed that the moment the plaintiff declared his willingness to pay fare, the right of the defendant to continue the expulsion *eo instantur* ceased, and the right of the plaintiff as a proposed contractor with the corporation commenced.

This claim is founded upon the assumption that an individual who is in the process of being lawfully and necessarily ejected by force, from the cars in pursuance of statutory authority, stands in the same relation to the carrier as an unobjectionable person tendering fare, and asking passage on its trains from a regular station.

It was held in *O'Brien v. N. Y. C. & H. R. R. Co.*, 80 N. Y. 236, that if the stoppage of a train is rendered necessary to expel a passenger therefrom, for a fractious refusal to pay fare, he does not by offering to pay it before expulsion, become entitled to continue the trip. This authority is quite conclusive upon the question, that a mere offer to pay fare under all circumstances does

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not establish new relations between the passenger and carrier, and entitle the passenger to continue his passage. *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455, 460 is to the same effect. There the passenger had bought a ticket which entitled him to transportation from Hornellsville to Scio. After having once shown his ticket to the conductor, he refused to show it again, upon a second request, at a point between the commencement and terminus of his journey. After the train had been stopped for the purpose of expelling him therefrom for such refusal he exhibited his ticket, but the defendant put him off the train notwithstanding. It was held that this expulsion was justifiable because of the refusal of the passenger to comply with the reasonable requirements of the carrier.

Although it must be assumed upon the evidence in this case that the transaction in question occurred at a stopping place, where passengers had the right to get on and off the cars, yet it should be borne in mind that it was not a regular station, and the ordinary time of stoppage at that place was momentary and was required by law as a measure of precaution in cases wherever railroads crossed each other at grade. Such a transaction as that in question would necessarily cause a detention of a train for a longer or shorter period, according to the circumstances, and the proof in this case shows the detention to have been three minutes.

When a passenger by an illegal refusal to pay fare has rendered it the duty of a conductor, in enforcing the reasonable rules and regulations of the company, to eject him from the cars, and the refusal and resistance of the passenger continues until after force has been required and applied, to enforce such rule, we think he cannot make the continuance of the process of expulsion unlawful, by an offer to pay fare during its progress.

Having invited an appeal to force, the passenger cannot at his option reserve the privilege of shielding himself from its application, by invoking the protection of a contract, the implied conditions of which he has violated. The trial of his right, in a manner which he has deliberately selected, cannot be arrested by him when its course is not proceeding to his satisfaction, so as to make its continuance by the other party unlawful.

The contention of the respondent proceeds upon the assumption that any person, by tendering fare, has established a right to passage upon the trains of a carrier of passengers. This, we think, is not correct. Such a carrier is not required unconditionally to ac-

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cept all persons who offer themselves for transportation and tender fare. It has been held that they may lawfully decline to receive or carry those who refuse, after knowledge of the same, to conform to the reasonable rules of the company, or to pay their fare, or purchase tickets before entering the cars, and that it may lawfully eject from the train persons committing these offenses. 2 Rorer Railr. 958 *et seq.*

In such a case as this, we think a passenger who resists the lawful requirement of the company, to the extent of provoking a breach of the peace, and the exhibition of violence in the presence of other passengers, cannot, as matter of law, demand a passage upon the train where such an exhibition has been made.

A railroad company has the right, and it is its duty to enforce order in its cars, and to eject therefrom those who by indecent or obscene language, or by violent and boisterous behavior, cause danger, discomfort or annoyance to other passengers; and in the exercise of this right the officers of the company must determine as to the propriety of their action, being responsible for the reasonable exercise of their discretion. 1 Redf. Railw. 91, 92, 105; *People v. Jillson*, 3 Park. Cr. 234; *People v. Caryl*, 3 Park. Cr. 326; Rorer Railr. 958, 959.

It would be quite absurd to say that one whose unlawful conduct had provoked a breach of the peace should be able to throw upon his adversaries the blame of the affray, by simply withdrawing his challenge, and declaring his change of mind. He has provoked an unlawful affray and his rights are to be determined by the rules which apply to persons thus engaged. The act of expulsion is made legal by his unlawful refusal to pay fare, and any necessary force required to completely execute it would be justifiable.

It is, under the circumstances of this case, immaterial that this affray occurred at a station, as that fact is important only in considering the rights of parties with reference to new relations, or as bearing on the right of the carrier to determine the time and mode of expulsion. The case of *O'Brien* holds that when an oral controversy as to the payment of fares arises at or before arrival at a regular station, and while at such station, and before force has been applied to effect the expulsion, the passenger offers unqualifiedly to pay his fare, and tenders the money therefor, his subsequent expulsion under such circumstances would be unlawful, and we think decides nothing further than this.

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In this case it may also well be said that the measures rendered necessary by the conduct of the plaintiff would probably involve the detention of the train and the consequences deprecated in the *Hibbard* case and bring it within the letter of the rule there stated.

The judgment should be reversed and a new trial ordered, with costs to abide the result.

Judgment reversed.

All concur, except ANDREWS and DANFORTH, JJ., dissenting.

HEXAMER V. WEBB.

(101 N. Y. 377.)

Master and servant — contractor — nuisance.

Defendant employed B., who was engaged in "the roofing and cornice business," to repair the cornice of his hotel, in the city of New York. No price or plan was specified; and the mode of repair and the means to be employed were left entirely to the judgment of B. The employees of B. suspended a ladder from the roof upon which planks were placed to serve as a scaffold. A heavy wind caused one of the planks to fall; and it struck and injured the plaintiff who was passing. Defendant was not in the city during the repairs and had no knowledge of the manner in which they were being done. The building was separated from the sidewalk by an area of fifteen feet wide. *Held*, that the scaffold was not a nuisance, and the defendant was not liable.

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

I. T. Williams, for appellant.

Geo. S. Hamlin, for respondent.

MILLER, J. This action was brought by the plaintiff to recover damages alleged to have been sustained by means of the negligence of defendant's agents and servants in making repairs and improvements upon the hotel of the defendant, situate in the city of New York. The alleged negligence consisted in fixing and securing the staging used in performing the work, and the proof showed that the ladder used as a scaffold was suspended from the roof over the eaves of the hotel, and that upon it were placed planks which were used as a platform upon which the workmen employed stood to do

the work. This scaffold was moved from time to time around the bay windows from place to place. A heavy wind was blowing, and while shifting the ladder a gust came and the working of the wind and the grating against the cornice and wall cut the rope which held the planks on the ladder, and the wind turned the planks up so that they fell, and one of them in falling to the sidewalk bounded and struck the plaintiff. One Burford, who was engaged in the roofing and cornice business, was employed by the defendant to do the work, which was intended to obviate a difficulty caused by pigeons making their nests under the eaves of the roof of the hotel.

At the close of the testimony, a motion was made to dismiss the complaint upon the ground, among others, that if there was proof of negligence, it was not the negligence of the defendant, or his agents or servants, but of an independent contractor, and the plaintiff's counsel then asked to go to the jury upon several grounds, which were stated and refused. The motion to dismiss the complaint was granted, and the defendant's counsel excepted to the decision of the court.

The employment of Burford was of a general character, and the defendant was not restricted as to time or amount, or the specific services which were to be rendered. The accident occurred while Burford and his men were engaged in the performance of this work and this action was sought to be maintained upon the ground that the workmen employed, including Burford, were the servants of the defendant, and that the defendant as owner of the real estate was responsible to third persons for the carelessness, negligence or want of skill in those who were carrying on or conducting the business, and this whether the persons employed were working for wages or on contract. We think that the principle laid down has no application to the facts presented in the case at bar. As a general rule, where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered; and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but

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he is an independent contractor, and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another. If the owner of a building employs a mechanic to make repairs upon the same without any specific arrangement as to terms and conditions, such employment is in the nature of an independent contract, which imposes upon the employee the responsibility incurred by acts of negligence caused by himself or those who are aiding him in the performance of the work. It is absolutely essential in order to establish a liability against a party for the negligence of others, that the relation of master and servant should exist. In *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 184; s. c., 23 Am. Rep. 37, the rule applicable to such a case is laid down by ANDREWS, J., as follows: "It is not enough, in order to establish the liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. Unless the relation of master and servant exists, the law will not impute to one person the negligent act of another."

In the case considered, we think that by the contract between the defendant and Burford, the relation of master and servant was not created. Burford was a mechanic engaged in a particular kind of business which qualified him for the performance of the work which he was employed to do. By the arrangement with the defendant he was an independent contractor engaged to perform the work in question. He was employed to accomplish a particular object by obviating the difficulty which he sought to remove. The mode and manner in which it was to be done and the means to be employed in its accomplishment were left entirely to his skill and judgment. Everything connected with the work was wholly under his direction and control. No right was reserved to the defendant to interfere with Burford or the conduct of the work. It was the result which was to be attained that was provided for by the contract without any particular method or means by which it was to be accomplished. So long as the contractor did the work the defendant had no right to interfere with his way of doing it. The fact that no price was fixed and no specifications made as to the work to be done did not render the contract one of mere hire and service, or create the relation of master and servant between the parties. It can-

not, we think, be said that Burford did not agree to do the work required of him, and that no contract was made after the subject-matter and the difficulties attending the work had been considered and talked about. Burford said he would try and do something, and the defendant replied he didn't care how he did it. The conversation had amounted in law to an agreement that Burford would perform all the work that was required of him according to his own judgment as to what was necessary to be done to accomplish the object intended. He was an independent contractor, and the men employed by him were his servants and had nothing to do with the defendant. Burford was not the agent of the defendant in any sense in purchasing the material or in hiring the men to do the work. That the work was charged for by the day could make no difference, and did not alter the position which Burford occupied, in reference to the defendant, as an independent contractor. It did not give the defendant control over the job, or authority to hire or discharge the men, or render him in any way liable to them instead of Burford. It is very evident that the men employed were the servants of Burford, and therefore the defendant cannot be made responsible for their negligence. The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. Shearm. & Redf. Neg., § 76. In *Blake v. Ferris*, 5 N. Y. 48, 58; s. o., 55 Am. Dec. 304, within the rule last stated it is held that when a man is employed in doing a job or piece of work with his own means, and his own men, and employs others to help him, or to execute the work for him, and under his control, he is the superior who is responsible for their conduct, no matter for whom he is doing the work. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded. Upon these authorities there would seem to be no question as to the character of Burford's employment.

We are referred by the learned counsel for the appellant to numerous authorities as upholding the doctrine that Burford was not engaged in an independent employment, and that the defendant was therefore liable. After a careful examination we are satisfied that none of them sustain this position. Those cited from

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this State are certainly in a contrary direction. The other cases cited are clearly distinguishable from the case at bar, and establish no rule adverse to that which is supported, as we have seen, by the authorities in this State.

The claim that the ladder or scaffold suspended under the eaves of the hotel was a nuisance is not well founded. The proof on the trial did not show that the building was on the line of the street. It did show that the hotel was separated from the sidewalk by an area of fifteen feet. Without further proof it is difficult to see how the ladder or staging could be regarded as such an obstruction to the street as to constitute a nuisance. The action is based upon the ground of negligence, and there is nothing in the complaint alleging that the scaffold was suspended over the sidewalk or was in any respect an obstruction to the street. The gist of the action is negligence and unskilfulness in the construction of the scaffolding. It may be added that the scaffold itself was suspended for a legitimate purpose connected with the reparation and improvement of the building. It was not necessarily injurious and dangerous or an obstruction on the street, and if properly used might well be employed for the purpose intended. It could only become dangerous by being improperly constructed or by some wrongful and willful act. In view of all the facts it cannot, we think, be maintained that the scaffold necessarily was a nuisance.

The claim that the ladder was suspended in violation of the city ordinance is not well founded. The ordinance referred to prohibits the hanging of any goods, wares or merchandise, or any other thing, in front of any building at a greater distance than one foot. It was aimed against the obstruction of the streets. It is not apparent that the ladder overhung the street, but even if such was the case, it was a mere temporary structure, erected for the purpose of repairing the building, and not an obstruction within the meaning and spirit of the ordinance, which if it is manifest, was directed against goods, etc., which were exposed for sale, or for the purpose of attracting public attention thereto. The construction contended for would prevent the use of scaffolds in the reparation of buildings, which never could have been intended.

It is also insisted that the work in question was intrinsically dangerous, and hence the party authorizing it would be liable whether he did the work himself or let it out on contract. The answer to this position is, that the work itself was not necessarily injurious or

dangerous. It was merely necessary repairs or improvements for the benefit of the building, which under ordinary circumstances could be made without any serious results. The accident was caused by a gust of wind, which might well occur in the performance of any work of a similar character, and which could not well be guarded against or provided for. The act itself could only become dangerous and cause injury by some unforeseen circumstance, and the rule stated is not applicable.

There is, we think, no force in the position that the injury complained of was the result of an act absolutely necessary for the contractor to do in order to accomplish the desired end, and the suspending of the ladder may therefore be said to have been done by the defendant, and he is liable, although it was done by an independent contractor. It is apparent, from the evidence, that the injury resulted, not from any thing contracted for by the defendant, but something collateral thereto. The defendant's contract related to the improvement of the building alone. What was necessary to be done for that purpose, and the manner in which it should be done, rested with the skill and judgment of the contractor. The defendant was absent at the time, and had no knowledge of what was done or the manner in which it was done. The doing of the work and the mode in which it was to be accomplished were matters collateral to the contract between the defendant and Burford. For these the defendant could not be held responsible.

After a careful consideration of the questions presented, it follows that no error was committed by the judge in dismissing the complaint, or in his refusal to allow the case to go to the jury, nor did he err upon the trial in striking out the testimony given as to the declaration of one of the witnesses sworn upon the trial.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Duplex Safety Boiler Company v. Garden.

DUPLEX SAFETY BOILER COMPANY v. GARDEN.

(101 N. Y. 337.)

Contract — to "satisfaction."

The plaintiff contracted to alter boilers for the defendant, the price to be paid as soon as the defendant was "satisfied that the boilers as changed are a success." The work was done and the defendant used the boilers without complaint. *Held*, that an unfounded allegation of dissatisfaction was no defense to an action for the price. (*See note, p. 711.*)

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

John A. Deady, for appellants.

H. C. Place, for respondent.

DANFORTH, J. The plaintiff sued to recover \$700, the agreed price, as it alleged, for materials furnished and work done for the defendants at their request. The defense set up was that the work was done under a written contract for the alteration of certain boilers, and to be paid for only when the defendants "were satisfied that the boilers as changed were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff: "You may alter our boilers, changing all the old sections for your new pattern; changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting, also all necessary mason work, and turning boilers over to us ready to steam up. Work to be done by tenth of May next. For above changes we are to pay you \$700, as soon as we are satisfied that the boilers as changed are a success, and will not leak under a pressure of 100 pounds of steam.

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury found, completed the required work in all particulars by the 10th of May, 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellants is that the plaintiff was entitled to no compensation, unless the defendants "were sat-

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isfied that the boilers as repaired were a success, and that this question was for the defendants alone to determine," thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must of course accord with the terms of the contract, but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment alone is uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In *Folliard v. Wallace*, 2 Johns. 395, W. covenanted that in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. \$150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought, the defendant set up that he was "not satisfied," and the plea was held bad, the court saying, "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext and cannot be regarded." This decision was followed in *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, and *Miesell v. Globe Mut. L. Ins. Co.*, 76 N. Y. 115.

In the case before us the work required was specified, and was completed; the defendants made it available and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself — if the other party so agrees — whether it shall be accepted. Such instances are cited by the appellants. One who makes a suit of clothes (*Brown v. Foster*, 113 Mass. 136; s. c., 18 Am. Rep. 463),

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or undertakes to fill a particular place as agent (*Tyler v. Ames*, 6 Lans. 280), mold a bust (*Zaleski v. Clark*, 44 Conn. 218; s. c., 26 Am. Rep. 446), or paint a portrait (*Gibson v. Cranage*, 39 Mich. 49; s. c., 33 Am. Rep. 351; *Hoffman v. Gallagher*, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it, no error has been shown.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

NOTE BY THE REPORTER. — It will be convenient to group the numerous cases on this subject in one note.

1. *As to contracts.* — As to a contract for a "satisfactory" suit of clothes, see *Brown v. Foster*, 118 Mass. 136; s. c., 18 Am. Rep. 468; for a "satisfactory bust," *Zaleski v. Clark*, 44 Conn. 218; s. c., 26 Am. Rep. 446; for a "satisfactory portrait, see *Gibson v. Cranage*, 39 Mich. 49; s. c., 33 Am. Rep. 351.

Where a party contracts to do work to the satisfaction of a third person, in an action to recover the stipulated price he must aver and prove that the work was done to the satisfaction of such person. *Butter v. Tucker*, 24 Wend. 447; *Barton v. Hermann*, 11 Abb. Pr. (N. S.) 387.

In *Tyler v. Ames*, 6 Lans. 280, it was held that a contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer when in his judgment the agent fails to meet that requirement of the contract. The court said: "The word 'satisfactorily,' refers to the mental condition of the employer, and not the mental condition of a court or jury. The right of determining whether the plaintiff filled the position of agent satisfactorily must, from the nature and necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer, under such a contract, to prove that plaintiff did not fill the place satisfactorily would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as without such a clause he would have the right to dismiss the plaintiff if he did not properly perform his duties. The question is quite similar to the one that is sometimes raised on chattel mortgages, containing a clause authorizing the mortgagee to take the property and sell it when he deems himself insecure. The weight of authority is in favor of the right of the mortgagor to take and sell the property without any obligation to prove that the facts and circumstances surrounding the parties justified him in deeming himself insecure. *Huggans v. Fryer*, 1 Lans. 276; *Chadwick v. Lamb*, 29 Barb. 518; *Rich v. Mills*, 20 Barb. 616; *Hall v. Sampson*, 19 How. Pr. 481; *Farrell v. Hildreth*, 38 Barb. 178." To same effect, *Cline v. Libbey*, 46 Wis. 123; s. c., 32 Am. Rep. 700.

In *McCarren v. McNulty*, 7 Gray, 189, the same doctrine was held as to a contract to make a book-case, of a certain kind and of certain dimensions, "in

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a good, strong and workmanlike manner, to the satisfaction " of one of the defendants. The court said; " It may be that the plaintiff was injudicious or indiscreet in undertaking to labor or furnish materials for a compensation the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations and the risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions."

In *Hart v. Hart*, 22 Barb. 606, a son agreed to support and maintain his father during his life and covenanted that if at any time the father should become dissatisfied with living with him, the son would pay his board. *Held*, that the father had a right to quit the family of his son whenever he became dissatisfied, without showing a good excuse for leaving, and that it was for him to judge whether there was good cause for dissatisfaction. The court said: " It is a case where the law will not undertake to say for the party he must be satisfied and has no right to be dissatisfied with living in this family; for the party by the express terms of the contract has made his own feelings the sole judge of the matter. Contentment and satisfaction with a man's position in a particular family is a matter which the law will not assume to determine for him. Neither will it do the converse, and say he had no cause to be discontented and dissatisfied, and therefore he cannot be regarded as dissatisfied."

There are a few cases that look in the opposite direction.

In *Wetterwulgh v. Knickerbocker Building Association*, 2 Bosw. 881, the defendant's articles provided that in case any member, by sickness, removal or misfortune, become unable to pay his dues, he might withdraw, " and in case the board of trustees are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned." *Held*, that the plaintiff was entitled to withdraw and a return of his money, if he showed such facts as in law and in good conscience ought to have satisfied the trustees:

In *Manufacturing Company v. Brush*, 43 Vt. 528, the action was founded upon a contract between the plaintiff and the defendant, by which the defendant was to take a sugar evaporator of the plaintiff upon trial, and pay for it if he liked it, the plaintiff to take it back if he did not like it. The court said: " The trial upon which the defendant took the evaporator was to be had for the purpose of ascertaining whether the defendant liked it or not, and not for the purpose of ascertaining whether it was equal to the plaintiff's recommendations of it or not. The trial was to be had solely with reference to the defendant's wishes in respect to the machine for such uses as he might find he could make of it and not with reference to any usefulness of it to other persons. To this trial the defendant was bound to bring honesty of purpose; any thing short of that would not determine his wishes fairly, but only his willful caprice or his dishonorable design. To it he was not bound to bring any more capacity or judgment than he had, for he was only to ascertain his own wishes, and these could be measured by no judgment or capacity but his own. He was not to determine what would be the wishes of ordinary persons under like circum-

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stances, and therefore was not bound to use the care and skill of ordinary persons in making the determination. His duty to the evaporator, as custodian of it, is not now here in question, but only his duty and liability under the contract concerning it. This duty was the trial of it, and payment for it, if on trial of it he liked it. To the trial the charge of the court required him to bring honesty of purpose and judgment according to his capacity to ascertain his own wishes, and refused to require the skill and care of ordinary persons in making that determination. This seems to have been correct."

Daggett v. Johnson, 49 Vt. 845, was an action for the price of milk pans. The court said: "The contract of defendant requested plaintiffs to deliver the pans to the defendant, and he agreed to pay them therefor \$80 on the first of July, 'if satisfied with the pans.' We think the ruling of the court that the defendant had no right to say, arbitrarily, and without cause, that he was dissatisfied, and would not pay for the pans, was sensible and sound. The pans were made with appliances to graduate the temperature of the milk by running water; and in that consisted their excellence. Without these, they were like other pans, save their greater capacity. All this the defendant well knew. If a man orders a garment made of given material and fashion, and promises to pay if satisfied, he cannot say that the garment in material and manufacture is according to the order, and yet refuse to test the fit or pay for it. He must act honestly, and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject-matter and surrounding circumstances. His dissatisfaction must be actual, not feigned: real, not merely pretended. *Manufacturing Co. v. Brush*, 48 Vt. 528."

In *Gray v. Cent. R. Co. of New Jersey*, 11 Hun, 70, an action of damages for breach of contract to purchase a steamboat "provided upon trial they are satisfied with the soundness of her machinery," etc., *held*, that no recovery could be had unless it were shown that the defendant was satisfied; whether or not he ought to have been was immaterial. The court said: "By this clause the agreement left it entirely for the defendants to determine whether or not they were satisfied. There is no reason in law why parties may not, if they think proper, make agreements of this kind. And in all cases where such agreements have been made, the determination of the party that he is not satisfied, and his refusal to accept and pay for the property, is conclusive and terminates the contract." Citing *Ellis v. Mortimer*, 1 B. & P. 257; *McCarren v. McNulty*, 7 Gray, 189; *Aiken v. Hyde*, 99 Mass. 183; *Goodrich v. Norwich*, 43 Ill. 336; *Hunt v. Wyman*, 100 Mass. 198; *Heron v. Davis*, 3 Bosw. 336. So in *Spring v. Ansonia Clock Co.*, 24 Hun, 175, there was a contract of hire, "provided his work and services should be to their satisfaction." *Held*, an employment at the pleasure of the hirer, and that he might discharge the servant without assigning any reason. The court said: "That fact"—satisfaction—"is subject to no determination but the will of the company expressed through the proper agency. The determination of the question, whether the services of the plaintiff under this contract were satisfactory, belonged entirely to the company, subject to no control from the courts. The will of the company is the only tribunal to which the question can be referred."

In *Cassidy v. Janauschek*, Pennsylvania Common Pleas, December, 13, 1884,

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it was held that a contract of hiring which provides that an actress may be discharged if the manager is satisfied in good faith that the actress is incompetent, makes the manager the sole judge of the competency of the actress, and if the manager discharged the actress for that reason, he is not liable for error of judgment exercised in good faith, although the jury should believe that the actress was competent. The particular reason for discharge was the plaintiff's refusal to go on the stage in disguise as a member of the mob in the tragedy of Marie Antoinette. The court said: "In a business which depends so much upon the effect produced upon the audience, as that of play acting it seems reasonable that all the players should be subject to a call to assist in making a good presentment of the necessary tableaux. A good actress, moved by a proper spirit toward her manager, ought to have been ready and willing to do all in her power to contribute to the promotion of that success upon which both so much depend. So far the case has been considered upon the law applicable to contracts of hiring, without regard to the terms of the special contract in this case, which provided, that if upon fair trial, the defendant felt satisfied that the plaintiff was incompetent to perform the duties for which the defendant had contracted, in good faith, the latter might annul the contract on two weeks' notice. This clause made the defendant the sole judge of the competency of the plaintiff. In the case of *Nelson v. Von Bonnhorst*, 29 Penn. St. 352, it was held that a contract 'to pay whenever in my opinion my circumstances will enable me to do so,' imposes no legal obligation which can be enforced by action, although the court and jury should find that the party was of sufficient ability to pay the debt, as by the terms of the contract the debtor is made the sole judge of that fact. Under the contract in this case, the only question for the jury to determine was the good faith of the defendant, and therefore the jury was instructed that if the defendant was satisfied in good faith that the plaintiff was incompetent, the defendant had a right to dismiss the plaintiff, and in that case the verdict should be for the defendant, although the jury were of opinion that the plaintiff was competent to perform her parts. The defendant was not liable for error in her judgment, if in good faith she exercised her judgment and acted upon it. Having the power to give judgment, she is not liable for error if she did not act maliciously, although she may have exercised her power arbitrarily. *Downing v. McFadden*, 18 Penn. St. 834. No one is liable for a mistake in the exercise of a discretion conferred upon him. *Moore v. School Directors of Clearfield*, 59 Penn. St. 282. The defendant testified that she was satisfied that the plaintiff was incompetent, and discharged her for that reason, as well as others, and she very properly introduced evidence showing that she has a basis for her judgment as evidence of her good faith, and for the purpose of showing that she did not set up her judgment as an afterthought and subterfuge to avoid the consequences of her action, and she made so strong a presentment that it is not free from doubt whether the jury ought not have been directed to render a verdict for the defendant."

In *McCormick Harvesting Machine Co. v. Chesrown*, 33 Minn. 82, where the agreement was to furnish a machine "guaranteed to work satisfactorily," it was held that the purchaser had a right upon a reasonable trial, to reject it if it did not work satisfactorily to him.

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In *McClure v. Briggs*, Vermont Supreme Court, February 20, 1886, A. set up an organ in B's house, upon an agreement that B. should keep it and pay for it if it proved satisfactory to him. B. thought, without cause, that he was dissatisfied, and notified A. *Held*, that provided he acted in good faith, he was the sole judge as to his satisfaction with the organ. The court said: "Notwithstanding the opinion of the expert, he was so under the spell of the Estey organ vendor that he still thought he was dissatisfied with the tone of the organ; and if he really thought so, he was so, for as a man 'thinketh in his heart, so is he.' But it is said that he was bound to be satisfied, as he had no ground to be dissatisfied. He was bound to act honestly, and give the instrument a fair trial, and such as the seller had a right, under the circumstances, to expect he would give, and herein to exercise such judgment and capacity as he had, for by the contract he was the one to be satisfied, and not another for him. If he did this, and was still dissatisfied, and that dissatisfaction was real and not feigned, honest and not pretended, it is enough, and plaintiffs have not fulfilled their contract, and all these elements are gatherable from the report. This is the doctrine of *Hartford Manuf. Co. v. Brush*, 43 Vt. 528, and of *Daggett v. Johnson*, 49 Vt. 845. In the former case the defendant was required to bring to the trial of the evaporator only honesty of purpose, and judgment according to his capacity, to ascertain his own wishes, and was not required to exercise even ordinary skill and judgment in making his determination. *Daggett v. Johnson* turned on an error in the admission of testimony, but Judge REDFIELD goes on to discuss the merits of the case somewhat, following substantially in the line of *Brush's* case, and citing it as authority. But *Daggett v. Johnson* is distinguishable in its facts from *Brush's* case and from this case, in that the defendant omitted to test the plans in the very respect in which he knew it was claimed their excellence consisted." Citing *McCarren v. McNulty*, 7 Gray, 189; *Brown v. Foster*, 118 Mass. 186; s. c., 18 Am. Rep. 468; *Zaleski v. Clark*, 44 Conn. 218; s. c., 26 Am. Rep. 446. "Since the case at bar was decided, the very recent case of *Singerly v. Thayer*, in the Supreme Court of Pennsylvania, reported in 25 Amer. Law Reg. (N. S.) 14, has fallen under my notice, with the learned note appended thereto. There the defendant in error agreed to put in an elevator for plaintiff in error, 'warranted satisfactory in every respect.' After trying it defendant refused to accept it, and it was held that if he acted in good faith he was, by the terms of the contract, the sole judge whether it was satisfactory or not. The cases are there largely reviewed, and found almost unanimously to sustain the view taken by the court."

See note, 52 Am. Rep. 158. As to the analogous case of the phrase "deem himself in danger," in chattel mortgages, see *Burrett v. Hart*, 42 Ohio St. 41; s. c., 51 Am. Rep. 801, and note, 805.

In *Singerly v. Thayer*, Pennsylvania Supreme Court, October 5, 1885. A. agreed in writing to construct an elevator in B.'s new building, "according to verbal specifications given by your architect for \$2,800, warranted satisfactory in every respect." *Held*, that the words "satisfactory in every respect" referred to B., and that a refusal by him to accept the elevator, made, not capriciously, but in good faith, on the ground that it did not work satisfactorily, would be

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sustained. The court said: "The controlling question is what meaning and effect are to be given to the words 'warranted satisfactory in every respect?' Satisfactory to whom? Certainly not to the maker only. Was it to be satisfactory to the person for whom it was to be made and by whom it was to be used? The learned judge thought this was not a necessary requirement, but if it was built in a workmanlike manner and performed its intended purpose in a manner which ought to be satisfactory to the plaintiff in error, that was sufficient. In other words, it may have been wholly unsatisfactory to him, yet if the jury thought he ought to have been satisfied, he was bound to accept it. In effect that is, it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called to pass on the rights of the parties. The proposition was made to induce him to purchase a kind of elevator not in general use. The fair inference is that he desired to procure one that would be satisfactory to himself. The manifest import and meaning of the language used is, that it should be satisfactory to him. This then was the agreement. To him alone was the proposition made. It would not have been any clearer had it read warranted satisfactory to you in every respect. He therefore was the person to decide and to declare whether it was satisfactory. He did not agree to accept what might be satisfactory to others but what was satisfactory to himself. This was the fact which the contract gave him the right to decide. He was the person negotiating for its purchase. He was the person who was to test it and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith. *McCarren v. McNulty*, 7 Gray, 136, was on an agreement to make a book-case, "in a good, strong and workmanlike manner, to the satisfaction of the president of the society," for which it was to be made. It was held not to be sufficient to prove that it was constructed according to the terms of the agreement without also of proving it was satisfactory to or accepted by the defendant. When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove he ought to have been satisfied. It was so held in *Gray v. Railroad*, 11 Hun, 70, where the contract was for the purchase of a steamboat; in *Brown v. Foster*, 113 Mass. 136; s. c., 18 Am. Rep. 463, where the agreement was to make a suit of clothes; in *Zaleski v. Clark*, 44 Conn. 218; s. c., 26 Am. Rep. 446; and a contract for a plaster bust of the deceased husband of defendant; in *Gibson v. Cranage*, 49 Mich, 39; s. c., 33 Am. Rep. 331, where a portrait was to be satisfactory to the defendant, and in *Hoffman v. Gallagher*, 6 Daly, 42, where a portrait of defendant was to be satisfactory to his friends. So where a person got a set of teeth from a dentist under an agreement that they were to be satisfactory, it was held, *Hartman v. Blackburn*, 7 Pittsb. Leg. Jour. 140, that he was made the exclusive judge of their value. To justify a refusal to accept the elevator on the ground that it is not satisfactory, the objection should be made in good faith. It must not be merely capricious. It is declared in 1 Pars. Cont. 542, if A. agrees to make something for B. to meet the approval of B., or with any similar language, B. may reject it for any objection which is made in good faith and is not merely capricious. *Andrew v. Belfield*, 2 C. B. (N. S.) 779 is cited to support this view. That case arose on a written agree

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ment to build a carriage in a manner which should meet the approval of the person for whom it was to be made, not only on the score of workmanship, but also that of convenience and taste. It was held that his rejection made in good faith was conclusive."

In *Baltimore & O. R. Co. v. Brydon*, Maryland Court of Appeals, March 11, 1886, it was held that where A. agrees or contracts to furnish B. with coal of a certain quality daily, B. having the right to determine the quality of the coal, and to refuse it if below grade, B. must exercise judgment and good faith in his decision; and the jury is entitled to determine whether he did or not. The court said: "It cannot be a matter of doubt that both parties intended that the coal should be furnished from the plaintiff's mine. As a matter of course, it was not expected that it should be equal in quantity to that which came from the Big Vein mines, and no just construction of the contract can give it such a meaning. It was however to be satisfactory to the officers who were named. But this term of the contract did not give them a capricious or arbitrary discretion to reject it. It was their judgment which was to decide the question of acceptance, but the law required them to exercise a fair, just and honest judgment on the subject. Certainly they were not obliged to accept the coal if they thought it was not fit for the use contemplated by the contract. Neither on the other hand, would they be justified in rejecting it for the reason that it did not possess qualities which at the time of the contract it was known by the parties that it did not possess. By the terms of the contract the whole decision was committed to them. If they made their decision against the coal in good faith, the defendant would not be obliged to accept it; but if they fraudulently rejected it, their judgment would be without effect in law, and the defendant would be excused by it. We on this point refer to *Lynn's* case, 60 Md. 404; s. c., 45 Am. Rep. 741, and approve and adopt it."

If an article is delivered to a purchaser, to be retained and paid for by him if satisfactory, the purchaser may repudiate the sale if such article prove *bona fide* in fact unsatisfactory. The sale depends upon the mental condition or operation of the defendant as satisfied or dissatisfied with the manner in which the fans worked, not generally or anywhere, but in that particular shop. The plaintiff is subject to such condition or operation of the mind of the defendant when induced or caused by the test prescribed, otherwise they might be feigned, capricious or mercenary. We think the true rule in such a case is that if the fans are not honestly and in good faith satisfactory to the defendant, and the defendant notified the plaintiff of that fact in a reasonable time, then, and in that case, there had been no sale, and the defendant is not liable for the price. Many respectable authorities hold that such a sale is strictly illusory, and the property passes only at the option of the buyer. But we think the more reasonable rule is the one above laid down, and is supported by better authority. A recent case in the Circuit Court of the United States for the District of California, of *Silsby Manuf. Co. v. Town of Chico*, 24 Fed. Rep. 893, was closely analogous to this case. The steam engine was sold "if satisfactory" to the buyer. It was held by SAWYER, J., that where under a contract an article is made and delivered which shall be satisfactory to the purchaser, it must in

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fact be satisfactory to him or he is not bound to take it. But where the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not satisfied, that contract has been fully performed by the vendor, and the purchaser is bound to accept the article. Indeed to such import are really all of the authorities, which hold simply that to be dissatisfied in such a case is sufficient reason to refuse the purchase, for to be dissatisfied is a fact, and must be a verity, and not a pretext. It is not "I will not accept—will not have it" but "it is not satisfactory," or "I am really and honestly dissatisfied with it." This is implied in the very statement of the principle. Sup. Ct. Wis., May 15, 1888, *Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co.*

2. *As to chattel mortgages.*—In *Werner v. Bergman*, 28 Kans. 60; s. c., 42 Am. Rep. 152, it was held that where a chattel mortgage empowers the mortgagee to take possession when he "deems himself insecure," he may do so even if no reasonable ground exists therefor.

In *Barret v. Hart*, 42 Ohio St. 41; s. c., 51 Am. Rep. 801, it was held that a chattel mortgagee, authorized to take possession whenever he may "deem himself in danger of losing," etc., may do so, acting in good faith and upon facts subsequent to the mortgage, whenever he deems himself in such danger. In *Allen v. Vose*, 84 Hun, 57; s. c., 51 Am. Rep. 805, it was held that where it was provided that the mortgagee might take possession "if he shall deem himself unsafe," he had an absolute discretion which did not depend upon reasonable grounds.

To the same effect is *Cline v. Libby*, 46 Wis. 123; s. c., 2 Am. Rep. 700.

But to the contrary is *Roy v. Goings*, 96 Ill. 881; s. c., 88 Am. Rep. 151; criticised and disapproved in *Allen v. Vose, supra*.

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(101 N. Y. 291.)

Negligence — defective machine — injury to visitor on premises.

Where one goes upon the premises of another without invitation, to obtain employment, and is there injured by a defective machine, not obviously dangerous, he cannot recover from the owner (*See note, p. 722.*)

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

M. D. Grover, for appellant.

Matthew Hale, for respondent.

ANDREWS, J. We are unable to perceive upon the evidence, that any duty rested on the defendant to keep the whimsey in re-

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pair for the protection of the plaintiff. The defendant for its own purposes, and in the prosecution of its business, had constructed a machine for raising ore from its mines. It consisted of an upright, or mast, in which a lever was inserted by the device of a mortise and tenon, and as an additional precaution for keeping the lever in place, an iron pin was driven through the mast and tenon. The machine was worked by attaching horses to the end of the lever, by means whereof a bucket filled with ore was raised from the mine to the surface of the ground, and when discharged, the bucket by its own weight descended, turning the lever with some rapidity in its descent. The lever on the occasion in question, while the bucket was descending, was thrown out of the socket at the mast, and flying around, hit and broke the legs of the plaintiff, who was in a path leading to one of the pits worked by the defendant. The machine had been in use several years without accident. It appeared on examination of the lever, after the occurrence in question, that the pin which held it to the mast had broken through the wood of the tenon back of the point where the pin passed through it, and the lever not being firmly held to its place by the other arrangements, came out and caused the injury. There was evidence that other and surer precautions might have been, and in other mines had sometimes been taken, to secure the lever to the mast, than those adopted by the defendant. But the judge excluded the question of faulty construction from the jury, and submitted to them as the sole ground of negligence, to be considered, whether the defendant had omitted to make proper inspection of the machine, to discover defects arising after its original construction, or to make proper repairs to render it safe.

The negligence of the defendant, if any, upon the case as presented, consisted in an omission to take affirmative measures to ascertain and remedy defects in a machine originally suitable, developed by use, and which might have been discovered by proper inspection. It may be assumed, and the assumption is justified by decided cases, that as to persons standing in certain relations to the defendant, a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine, and that a failure to perform it would subject the defendant to liability to persons occupying such special relations, who should sustain injury from the omission. But the plaintiff stood in no such relation to the defendant, as imposed upon it the duty to keep the ma-

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chine in repair. He was, at the time of the accident, in every legal sense a stranger to the defendant. He had before that been employed by the superintendent of the company to work by the day, and had been assigned to a particular service, which however he had abandoned two days before the accident, and on the day of the accident he went upon the defendant's land to seek further employment at a pit to which the path used by the workmen led on which he was standing when the accident happened. He was on the premises at most by the mere implied sufferance or license of the defendant, and not on its invitation express or implied, nor was he there in any proper sense on the business of the company. The suggestion made to him by the foreman at pit No. 5, two days before the accident, on the occasion of his refusing to work at that pit any longer on account of the supposed danger, that he could probably "get a chance" at some other pit was not an authority or invitation by the company to him to visit the other pits on the premises. The foreman had no authority to give the plaintiff permission to go elsewhere upon the defendant's lands, and the suggestion was obviously a mere friendly one made by the foreman in the interest of the plaintiff. The fact that the plaintiff had on going to pit No. 10 engaged to commence work there on the following Monday, did not change his relation to the defendant, or make him other than a mere licensee on the premises. He went there on his own business, and in returning he was subserving his own purposes only. The precise question is whether a person, who goes upon the land of another without invitation to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises not obviously dangerous, which he passes in the course of his journey if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to this extent. There is no negligence in a legal sense which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances. An employer is required to take reasonable precautions and to exercise reasonable care in providing safe machinery and appliances for the use of his servant. The duty arises out of the relation. *Fuller v. Jewett*, 80 N. Y. 46; s. c., 36 Am. Rep. 575. The owner of land in general may use

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it as he pleases, and leave it in such condition as he pleases. But he cannot, without giving any warning, place thereon spring-guns, or dangerous traps which may subject a person innocently going on the premises, though without actual permission or license, to injury without liability. The value of human life forbids measures for the protection of the possession of real property against a mere intruder, which may be attended by such ruinous consequences. The duty in this case grows out of the circumstances, independently of any question of license to enter the premises. *Bird v. Holbrook*, 4 Bing. 628. So also where the owner of land in the prosecution of his own purposes or business, or of a purpose or business in which there is a common interest, invites another either expressly or impliedly to come upon his premises, he cannot with impunity expose him to unreasonable or concealed dangers as for example, from an open trap in a passageway. The duty in this case is founded upon the plainest principles of justice. *Corby v. Hill*, 4 C. B. (N. S.) 556; *Smith v. Landon & St. K. Docks Co.*, L. R., 3 C. P. 326; *Holmes v. North East. Ry. Co.*, L. R., 6 Exch. 123. The duty of keeping premises in a safe condition even as against a mere licensee may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed to great danger. The case of running a locomotive without warning over a path across the railroad, which had been generally used by the public without objection, furnishes an example. *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 189; s. c., 44 Am. Rep. 377; see also *Beck v. Carter*, 68 N. Y. 283; s. c., 23 Am. Rep. 175. The cases referred to proceed upon definite and intelligible grounds, the justice of which cannot reasonably be controverted. But in the case before us, there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous; the plaintiff was a mere licensee; the negligence, if any, was passive and not active, of omission and not of commission. Under the circumstances, we think the motion for nonsuit should have been granted. See *Severy v. Nickerson*, 120 Mass. 306; s. c., 21 Am. Rep. 614; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731.

The judgment should therefore be reversed, and a new trial ordered.

Judgment reversed.

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RAPALLO, EARL and FINCH, JJ., concur; DANFORTH, J., concurs in result; RUGER, C. J., dissents; MILLER, J., does not
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NOTE BY THE REPORTER.—The case of *Bolch v. Smith*, 7 H. & N. 786, is in point. “The plaintiff was one of a number of persons who obtained leave and license from the dock yard authorities to cross the yard from one place to another. The defendant had permission from the same authorities to put up certain machinery in the yard. The plaintiff while walking along the usual track fell down, not by reason of any obstruction, but in consequence of stumbling, and in trying to save himself, his arm came in contact with a revolving shaft and was lacerated. The danger was open and visible; there was nothing which could be called a ‘trap.’” See notes, 24 Am. Rep. 283; 26 Am. Rep. 562.

SWEENEY V. BERLIN AND JONES ENVELOPE COMPANY.

(101 N. Y. 580.)

Master and servant — negligence — unsafe machine — contributory negligence.

The plaintiff was employed to work on a machine of an old pattern, which had not all the safeguards of newer machines. He worked on it for several years and then told the owner's superintendent that it ought to have an additional safeguard. The superintendent promised to attend to it, but it was not furnished, and the plaintiff was required to continue to work with it under threat of being discharged if he refused. He complied and was injured. *Held*, that the master was not liable. (See note, p. 726.)

ACTION for personal injuries by negligence. The head-note states the case. The plaintiff had judgment below.

See Mass. case.

John E. Logan, for appellant.

Albertus Perry, for respondent.

DANFORTH, J. A motion by defendant for a nonsuit was denied, and the plaintiff had a verdict after instructions to the jury, to which, as the case states, no exception was taken by either party. We have therefore only to inquire whether the evidence justified its submission to the jury, as sufficient in any reasonable view to warrant a recovery. *Burke v. Witherbee*, 98 N. Y. 562. The

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machine by which the plaintiff was injured was moved by steam, over which he had no control, but when necessary its operations could be held in check by the pressure of his foot upon a pedal. The process of embossing required that the plate and die should register or coincide. To effect that he necessarily placed his hands between them, but before doing so, put his foot upon the pedal and stopped the press; then "all of a sudden," he says, "the cam came around and jolted a little harder than it usually does, and my foot slipped," the machine started, he got one hand out, but the other was caught between the plates and crushed: hence the injury complained of. By a timely removal of the belt through which power was communicated to the machinery, he could have avoided all danger. Whether under the circumstances he should have done so, was for the jury to say, and their verdict must be deemed conclusive in his favor upon that point.

To sustain the judgment in other respects the plaintiff alleges negligence on the part of the defendant in not providing a "clutch" or some contrivance other than the pedal to prevent motion in the machine while the operator's hands were exposed to danger. It is important to notice that no fault was found with the condition of the pedal, or other contrivances or the management of the engine. It may very well be that had the surface of the pedal been cut or roughened like a file or rasp its holding power would have been greater, but there is no evidence that it was ever in that condition, nor but that its surface was smooth or slippery when the plaintiff, five or six years before, entered the employment of the defendant and began to use the machine. The complaint to the superintendent was not as to the condition or any imperfection of the pedal, but as to its sufficiency. The plaintiff testified: "I stated" to him "that the only means of throwing this machine out of gear or stopping it was by putting the foot on that little treadle; then that could not be done unless the cam had got around it; the cam would have to clutch it before you could do that."

So the pleading and the plaintiff's evidence show that he was directed "to use and operate 'the Isaac Adams press,' which was an old embossing press, having no late or modern improvements for using or operating the same in safety;" that he entered upon the work in question upon belief that it was safe, "but at the same time told the defendant that he thought it required and ought to have an additional apparatus to stop the same and render it per-

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fectly safe and secure, but he was required to proceed with the work without any such change or improvement, although he requested the same to be furnished."

It must be conceded in favor of the plaintiff that the jury would have been authorized to find these facts, and although the complaint does not allege it, there is testimony tending to show that what the plaintiff asked was that a "clutch" be attached to the machine, and that the superintendent referred him to the machinist, who promised to attend to it as soon as he had time. All this however was before the work was undertaken, in doing which the accident happened. Upon that occasion the plaintiff says: "I told him it was an ugly job to work on, and he told me to go ahead with it and be careful, and if I did not care about doing it I could get out; that there were plenty of other people waiting for employment; that there were men coming in there every day looking for it; I asked him at different times to have it improved. I asked him if he would not have the press improved by having a brake put on it. He told me to go on, and if I did not, that there were plenty waiting for the job; I believe then I asked him about having the press repaired, having the improvements put on it, and he referred me to the machinist; I went to the machinist and he said that he would do all this that I explained to him about having the press improved, that he would do it when he had time."

It is evident that this is not a case where the machine by means of which the business was carried on was temporarily out of repair, as in *Clarke v. Holmes*, 7 Hurl. & N. 937, or *Kain v. Smith*, 89 N. Y. 375, or where the defect exposed the servant to any latent extraordinary danger, but at most one where the employer failed to discard a machine, or part of a machine, and supply its place with something different, and in the opinion of the plaintiff, something safer. He was under no obligation to do so. The machine was safe in any view of the evidence, so long as the pedal was pressed by the operator. It was not automatic; neither was the proposed substitute. Each required the attention of an intelligent actor, and the real condition and efficacy of the one in use was not concealed from or unknown to the servant. He knew as much about it, and the risk attending its use as the master. The defendant could not be required to provide himself with other machinery or with new appliances, nor to elect between the expense of so doing, and the imposition of damages for injuries resulting to servants from the

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mere use of an older or different pattern. In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability for injuries arising from its use. The general rule is that the servant accepts the service, subject to the risks incidental to it, and where the machinery and implements of the employer's business are at that time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards. *De Forest v. Jewett*, 88 N. Y. 264, where a car-coupler stepped into a sluice in defendant's yard and was run over. *Hayden v. Smithville Manfy. Co.*, 29 Conn. 548, where an employee in a mill received an injury to his hand by being caught in the gearing of a spring frame. In *Gibson v. Erie Railway Co.*, 63 N. Y. 449; s. c., 20 Am. Rep. 552, the last case is cited with approval, and the rule applied where an employee was killed by a projecting roof. Under such circumstances, the servant is regarded as voluntarily taking the risks resulting from the use of the machinery, unless, as is said, the master by urging on the servant, or coercing him into danger, or in some other way directly contributes to the injury, or assumes the risk. *Kain v. Smith*, *supra*, and *Hawley v. Northern Central R. Co.*, 82 N. Y. 370, cited by respondent, went upon that ground, and although in one the tool was defective, and in the other the road bed out of repair, negligence was not imputed to the servant. This exception is relied upon by the respondent. We think the evidence does not bring the defendant within it. If the defect had been in the pedal and a promise made to repair that, and yet directions given for its use, it might be otherwise, but here the promise, if there was any, concerned a new appliance, not attached to that particular machine, nor to any machine of that make. The "Adams machines," as the plaintiff's witnesses proved, were uniformly furnished with the pedal. A clutch had never been seen on one. They were for different purposes. The pedal was to stop the machine; the clutch was to put the machine in motion. But we think there was no promise made to the plaintiff, nor inducement offered him to take the risk. It cannot be said that there was any connection between the conversation above set forth, and the continuance of the plaintiff in the defendant's employment. Nor does the complaint allege any. On the contrary, it alleges a simple request "that the change or improvement be made," not a promise or suggestion that it

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should be. There was no direction by the master, nor reliance upon the judgment of a superior officer. It is plain that the danger to the knowledge of the plaintiff was inherent in the use of the machine, and to the work itself; the peril did not grow out of extrinsic causes or circumstances which could not be discovered by the use of ordinary precaution, nor to a condition of things different from those existing at the beginning of the service. It was part of the plaintiff's engagement that the master's work should be performed in the usual course and way of business. The work which the servant was called upon to do at the time in question was not of a different character from that which he originally undertook; and the machine upon which it was to be done was one then in use. No new duty or species of labor was imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that for which he was engaged, and the doing of which formed the consideration of his employment. To say that the master shall be liable to the servant in such a case is to say that he shall not have the benefit of labor for which he contracted. Such is not the law. The defendant might, if he chose, carry on his business with an old, rather than a new machine, and could not be required to keep in his employ a servant who would not run it. He might therefore call upon the servant to perform his stipulated service, and discharge him if it was withheld. A threat to do so is not coercion. Here there was nothing more. Under such circumstances, there is no ground for charging the defendant with negligence, or throwing upon it a risk assumed by the plaintiff when he took employment. While it is difficult to see how the accident could have occurred, except from the inattention of the plaintiff, that question was for the jury, but because the evidence in no aspect discloses negligence or failure of duty on the part of the defendant, we think the case was improperly submitted to them as one in which the plaintiff might recover.

The judgment should therefore be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

NOTE BY THE REPORTER.— The master is not bound to provide the best and safest appliances and machinery, for the purpose of the servant. As for example, a fire-escape; *Jones v. Granite Mills*, 126 Mass. 84; s. c., 80 Am. Rep. 661; or a fence around machinery, *Kelley v. Silver Spring Co.*, 12 R. I. 112; s. c. 84 Am. Rep. 615; or a U rail instead of a T rail for a switch guard,

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Smith v. St. Louis, etc., Ry. Co., 69 Mo. 32; s. c., 33 Am. Rep. 484; or a mail-car lower than the other cars, *Fort Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 188. "The case may be compared to that of a farmer who, with knowledge on the part of himself and those in his employ, that a horse he has had in use is disposed to be fractious and unmanageable, continues nevertheless to use him in his business. It may be compared to that of a merchant who continues to make use of a fluid for light, when something else which is within his reach has been demonstrated by experience to be safer. So far as we can perceive, the case of the manufacturer would not be different who should continue the use of a building which in the event of a conflagration would subject his employees to greater risks than one of different construction." So of a car-coupler, *Western, etc., R. Co. v. Bishop*, 50 Ga. 465; or a brake, *Wonder v. Baltimore, etc., R. Co.*, 82 Md. 411; s. c., 8 Am. Rep. 143; or the want of a jamb nut on an elevator; *Stack v. Patterson*, 6 Phila. 225; or of a handle to a pushing pole for shifting cars, *Phila., etc., R. Co. v. Keenan*, 103 Penn. St. 124. See *Payne v. Reese*, 100 Penn. St. 301.

See *Leary v. Boston and Albany R. Co.*, 189 Mass. 580; s. c., 52 Am. Rep. 733; *Pittsburgh, etc., R. Co. v. Sentmeyer*, 87 Penn. St. 405; s. c., 37 Am. Rep. 684.

In *Marsh v. Chickering*, 101 N. Y. 356, plaintiff, a servant in the defendant's employ, was injured by the slipping of a ladder which he was using in lighting lamps in front of defendants' building. The ladder was a new one which by defendants' permission plaintiff himself had ordered made, and which he had used in safety for over six weeks. After the ladder was delivered he told defendants' superintendent that it ought to be hooked and spiked, or there would be an accident. The superintendent promised to have this done. This promise was repeated several times, but was not performed. The accident occurred upon a stormy night, sleet, snow and rain falling, and the wind blowing. Plaintiff had lighted safely seven lamps, changing the position of the ladder each time; when lighting the eighth the ladder slipped. In an action to recover damages, *held*, that these facts did not justify a recovery, as it failed to prove that defendants had not furnished a proper ladder. The court said: "As a general rule it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employee who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him.

"The rule stated however is not applicable in all cases, and where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof.

"In considering the application of the rule just stated, due regard must be had to the limited knowledge of the employee as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise. *Powers v. N. Y., J. E. & W. R. Co.*, 98 N. Y. 274, 280.

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"In cases however where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment and who uses the ordinary tools employed in such work, to which he is accustomed and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if in using a utensil, which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured it is by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurs.

"We have been referred to no adjudicated case which upholds the liability of a party under circumstances of the same character as those presented by the evidence here. A rule imposing such a liability in the case considered would be far reaching and would extend the principle stated to many of the vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar. The plaintiff was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to.

"Even if it may be considered that a right of action exists in this case in favor of the plaintiff, under any circumstances, we think that the evidence would not justify a recovery for the reason that the defendants did not fail in furnishing a proper ladder for the use of the plaintiff in lighting the lamps. The rule is that the master does not owe to his servants the duty to furnish the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. *Burke v. Witherbee*, 98 N. Y. 562; *Shearm. & Redf. Neg.*, § 92. The defendants had procured a ladder which ordinarily would be regarded as safe for the purpose for which it was used. The plaintiff had used it for a long time without any accident or danger, and on the very night of the accident it had been placed in position and used several times successfully. That it failed at last for any reason does not establish that it was unfit for use. It might perhaps have been more perfect if it had had hooks and spikes, but this improvement was not absolutely essential to relieve the defendants from liability. It was enough that it was reasonably safe and suitable within the rule cited, and under such circumstances an action will not lie."

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Somewhat analogous is *Chicago, etc., Ry. Co. v. Londergan*, Illinois Supreme Court, May 15, 1886, it was held as follows: "An employee who engages in the service of a railway company in the running of its trains is presumed to do so with a knowledge of the dangers incident to such service, and he assumes the risks of its ordinary hazards. An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation in order to save himself from responsibility from accidents resulting from its use. If the machinery be of an ordinary character and in sound repair, and such as can with reasonable care be used without danger to the employee, this is all that is required. When the court instructed the jury for the plaintiff that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, side tracks, switches, turnouts, etc., and if it fails to do so, and an injury happen in consequence thereof to an employee in the exercise of due and reasonable care, then the railroad company would be liable, the jury must have understood from the instruction that the railroad company was absolutely required to use blocks in its switches and turnouts. There was no other negligence charged in the declaration to which this instruction could refer. Had it been proven that an unblocked switch or turnout was unsuitable or unsafe, or that defendant had not used proper care and skill in constructing its turnout or switch at Bureau Junction, a different question might be presented; but such was not the case. It is apparent from the evidence that unblocked switches have been in use on the various railroads all over the country for years, and it is a fair inference from the evidence that the blocking of switches is yet but an experiment. The invention is yet in its infancy. At all events the utmost that can be claimed for the new appliance is that where blocks are used it may be safer for the employee than where the switch is constructed according to the old plan. Conceding this to be true, as we have seen from the authorities cited, the failure to use the new device does not render the company liable. It must appear before the defendant can be held liable that the switch or turnout, as constructed and used, was not reasonably safe, or that it was not constructed with the usual care and skill. An employer is not required to change his machinery in order to apply or adopt any new invention. Whart. Neg. 218. The fact that a few of the railroads of the country have adopted the new device, or that the defendant has used it on a part of its road, is not enough to establish its utility, and establish negligence in every other road that adheres to the old system. The old system of constructing switches must be condemned; it must appear that unblocked switches are unfit for the purpose for which they are constructed. It is not enough to prove that in the opinion of witnesses blocked switches are safer for the employee, as the law does not require the lawyer to furnish absolutely safe machinery, or the most approved pattern; he is only required to furnish that which is shown to be reasonably safe and proper for the purpose for which it is constructed." Opinion by CRAIG, J.; MULKEY, C. J., SHOPE and MAGRUDER, JJ., dissenting.

In *Webber v. Piper*, 38 Hun, 853, the plaintiff was at work at a circular saw which was out of set. He had complained of it to his master's foreman, who told him he could not then attend to it, but would do so at noon, and instructed

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him to go on and use it. He did so, and was injured by reason of that defect. *Held*, that a nonsuit was proper. BARNARD, P. J., and PRATT, J., concurred; DYKMAN, J., dissented.

See *East Tenn., etc., R. Co. v. Duffield*, 12 Lea, 68; s. c., 47 Am. Rep. 819; *Guthrie v. Louisville, etc., R. Co.*, 11 Lea, 872; s. c., 49 Am. Rep. 286.

NICHOLS V. MACLEAN.

(101 N. Y. 523.)

Office and officer — action against intruder for salary.

The plaintiff, a police commissioner in the city of New York, appointed for a term of six years, was during the term unlawfully removed by the mayor, and the defendant was appointed in his place. The plaintiff was subsequently reinstated by legal proceedings. *Held*, that he was entitled to recover from the defendant the salary paid to him. *

ACTION for salary of office. The opinion states the case. The plaintiff had judgment below.

Samuel Hand, for appellant.

John D. Townsend, for respondent.

ANDREWS, J. The facts upon which this controversy depends, are few and substantially undisputed. The plaintiff was duly appointed police commissioner of the city of New York, for a term of six years from May 1, 1876, and duly qualified and entered upon and discharged the duties of the office until April 18, 1879. On that day the mayor of the city appointed the defendant MacLean police commissioner for the unexpired term of the plaintiff Nichols, the certificate of appointment reciting that the appointment was made by the mayor in pursuance of chapter 300 of the Laws of 1874, in place of Sidney P. Nichols, removed. Prior to the appointment of the defendant MacLean, the mayor had preferred charges against Nichols of official delinquency, upon which such proceedings were had that on the 5th day of April, 1879, the mayor made a certificate in writing removing the plaintiff from his office of police commissioner, which certificate with the reasons therefor he transmitted to

* *Contra: Stuhr v. Curran* (15 Vroom, 181), 43 Am. Rep. 858.

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the governor, who on the 17th day of April, 1879, approved in writing of such removal. The plaintiff in June, 1879, applied for a writ of *certiorari*, to review the proceedings removing him, which was issued August 12, 1879, addressed to the mayor who made return thereto, and on February 11, 1880, judgment was rendered in the proceeding declaring the proceedings of the mayor for the removal of Nichols and his judgment of removal "be and are hereby reversed, and in all things held for naught." The judgment, as appears from the opinion delivered by the court, proceeded upon the ground that no evidence was given before the mayor to sustain the charges made against Nichols, and that he was denied the right to be heard by counsel. The defendant, MacLean, on the 18th day of April, 1879, on presenting his certificate of appointment, was recognized by the board of police commissioners as commissioner in place of Nichols, and thereupon assumed the duties of the office and continued to act as commissioner until February 7, 1880, on which day the decision of the court in the *certiorari* proceeding having been called to the attention of the board, Nichols was officially recognized as commissioner, and on that day resumed, and thereafter continued to discharge the duties of the office. During the period between the 17th of April, 1879, and the 7th of April, 1880, the defendant drew and received from the city of New York, \$4,700, the salary for that time of the office of police commissioner. It is found that the plaintiff during the time he was excluded from office was ready and willing to perform the duties thereof, and it was proved that the plaintiff on the 18th day of April, 1879, upon presentation by the defendant of his certificate of appointment, protested to the defendant that his removal was unauthorized and that there was no vacancy to be filled by the mayor. This action is brought to recover the salary received by the defendant during the time he served as police commissioner under the appointment of the mayor, and the sole question is whether, upon the facts found, the action lies.

It is convenient to consider in the outset what right the plaintiff acquired by virtue of his appointment as police commissioner in May, 1876. The term and salary of the office were fixed by statute. The plaintiff was entitled by virtue of his appointment to a term of six years, and to an annual salary of \$6,000, subject however to removal from office by the mayor for cause, after an opportunity to be heard. Laws 1873, ch. 335, § 25. The plaintiff could

not be deprived of his office or his salary, except under authority of law. His right to the possession and emoluments of the office, unless forfeited by his misconduct or his office was voluntarily abandoned or taken away by law, was "as perfect a right as the title of any individual to his property, real or personal." SANFORD, J., *Conner v. City*, 2 Sandf. 370. It is true that in this country offices are not hereditaments, nor are they held by grant. The right to hold an office and to receive the emoluments belonging to it does not grow out of any contract with the State, nor is an office property in the same sense that cattle or land are the property of the owner. It is therefore the settled doctrine that an officer acquires no vested right to have an office continued during the time for which he was elected or appointed, nor to have the compensation remain unchanged. The legislature may abolish an office during the term of an incumbent, or diminish the salary, or change the mode of compensation, subject only to constitutional restrictions. *Conner v. Mayor, etc.*, 5 N. Y. 285. But within these acknowledged limits, the right to an office carries with it the right to the emoluments of the office. An office has a pecuniary value, although primarily it is an agency for public purposes. The doctrine that the right to the emoluments of an office follows the true title, has been repeatedly declared in this State. ALLEN, J., *People v. Tieman*, 30 Barb, 193; *Dolan v. Mayor*, 68 N. Y. 274; s. c., 23 Am. Rep. 168; *McVeany v. Mayor*, 80 N. Y. 185; s. c., 36 Am. Rep. 600. And these decisions are enforced by the cases which hold that in an action by an officer to recover fees, his title may be put in issue, and that an action therefor cannot be maintained by an officer *de facto* only. BRONSON, J., 1 Denio, 579, and cases cited; *People v. County of Bedford*, 7 S. & R. 392. The plaintiff therefore by his appointment acquired a right to hold the office of police commissioner for six years, and to receive the salary, subject to removal upon a hearing, for cause, which right, although not technically property, was valuable and is under the protection of the law. From a very early period of the law, the invasion of a right to hold and exercise the duties of a public office has been recognized as a legal wrong for which the law affords a remedy. The writ of *quo warranto* was an ancient writ to try the right of one holding a public office (2 Bl. Com. 263), and in England from an early day, an action for money had and received would lie in behalf of one entitled to an office, to recover the accus-

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tomed fees of the office received by an intruder. *Howard v. Wood*, 2 Lev. 245; *Greene v. Hewitt*, Peake N. P. 843; *Boyster v. Dods-worth*, 6 T. R. 681; 1 Selw. N. P. 81. That the action of the mayor in removing the plaintiff was wrongful was adjudicated in the *certiorari* proceedings, and from the judgment therein no appeal was taken. This court also decided in *People v. Nicholl*, 79 N. Y. 582, which was a proceeding for prohibition, that a *certiorari* was a proper remedy to review the action of the mayor. The effect of the judgment in the *certiorari* was to annul the mayor's proceedings, and was followed by a reinstatement of the plaintiff in the office from which he had been unlawfully removed. Whether the judgment *ipso facto* worked a reinstatement of the plaintiff, we need not consider. The defendant voluntarily surrendered the office to the plaintiff, or at least he acquiesced in his resuming possession. The record in the *certiorari* proceeding was admitted in evidence on the trial in this case against the objection of the defendant and it is claimed that the ruling is erroneous for the reason that the defendant was not a party to the proceedings and that as to him the judgment therein did not establish that the removal was wrongful. The general rule that the estoppel of a judgment extends only to parties and privies is well settled. It is not always easy to determine who are privies within the rule. The *certiorari*, as this court held, was a proper proceeding. The mayor under the statute was vested with the power of removal to be exercised in a particular manner and under certain limitations affecting the right of the person whose removal was contemplated. These limitations were not observed, and the removal was therefore held to be unauthorized. The defendant held the office under an appointment by the mayor which on its face declared that he was appointed to fill a vacancy caused by the removal of Nichols. The defendant derived his title from the mayor, and the mayor, as was adjudged in the *certiorari* proceedings, had at the time no power to make an appointment, because there was no vacancy. It has been held that where the title to a corporate office has been determined in a litigation between conflicting claimants in a proceeding by *quo warranto*, the adjudication is competent evidence against the corporation in an action for salary, or to compel the corporation to certify an election, and also that where the title to office of a person exercising the power of appointment has been adjudged against him, the judgment is admissible against his appointee on the ground

that his title must abide by that of the person from whom he derives title. *McVeany v. Mayor, supra*; *Rex v. Hebden*, And. 388; *Rex v. Grimes*, 5 Burr. 2598; Lord KENYON, in *Rex v. Mayor of York*, 5 T. R. 66. These cases, although not precisely in point, are analogous to the one before us. The defendant derives title under an appointment by the mayor; it has been adjudged in a proper proceeding against the mayor that he had no authority to make the appointment and that the plaintiff was improperly removed; the proceeding had some of the characteristics of a proceeding *in rem*; it was an investigation made under competent authority, in the name of the people, concerning matters of public as well as private interest, and to ascertain the status of the plaintiff. We think the record was competent evidence against the defendant. Whether it was conclusive in the absence of collusion or fraud need not be determined, as no affirmative evidence was offered by the defendant in support of his title outside of the formal papers. It is further insisted that in this State, the title to an office cannot be tried in an action against an intruder for the salary, and that it can be determined only in a proceeding by *quo warranto* or since the Code by a direct action in the nature of *quo warranto* instituted by the attorney-general. The remedy by information in the nature of a *quo warranto*, under the Revised Statutes, authorized a judgment not only upon the right of the defendant, but also upon the right of the party averred to be entitled (2 Rev. Stat. 582, § 31), and in case the right of the claimant was established by the judgment he was authorized upon filing a suggestion to recover the damages sustained by reason of the usurpation of the defendant (§ 34). The courts held that they would not, at the instance of a person out of possession of an office, try the title to the office by *mandamus* or other proceeding, but would leave him to his remedy by information, and it has been said in several cases that the title could only be tried in that proceeding. *People v. Stevens*, 5 Hill, 616; *People v. Vail*, 20 Wend. 12; *People v. Ferris*, 76 N. Y. 326; *People v. Lane*, 55 N. Y. 217. The cases proceed upon an intelligible principle. It would be productive of great inconvenience if a person out of possession should be permitted before ousting the person in possession and establishing his own title by a direct proceeding, to maintain an action against the intruder for the salary the result of which would neither put the intruder out of, nor the plaintiff into the office, and to have the title to an office decided in a

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collateral proceeding in which the people were not represented. But in this case the *de jure* officer has been restored to the possession from which he was wrongfully ejected. It has been judicially determined in a proceeding in behalf of the people that his right to the office was never legally interrupted. The defendant was not in possession when the action was commenced, and an action under the Code to eject him from the office could not be maintained. Where the further prosecution of the proceeding by *quo warranto* is necessary to accomplish a purpose beyond the ouster of the defendant, the proceeding does not necessarily abate by the voluntary surrender of the office by the defendant after the proceeding is instituted. *Queen v. Blizzard*, L. R., 2 Q. B. 55. It is however the general rule that *quo warranto* will not lie where the office is vacant. *Rex v. Whitwell*, 5 T. R. 85. But it is insisted that conceding the unlawful expulsion, and the intrusion by the defendant, it is not *res adjudicata* in this State that an action can be maintained by the party dispossessed, against the intruder, to recover the emoluments of the office received by him. In the case of *Dolan v. Mayor, etc., supra*, it was assumed that such an action could be maintained, and authorities were cited to maintain the proposition. The determination of this question was not perhaps essential to sustain the judgment in that case. But we think the doctrine is founded in reason and authority. The plaintiff being the officer *de jure*, was entitled to earn the salary. It is true that he did not render the service for which the salary is the compensation. But he was ready and willing to render it, and was prevented by the conjoint acts of the mayor and the defendant. The case of *McVany v. Mayor, supra*, shows that the right to the salary of an office is not necessarily dependent upon the actual rendition of service by the claimant. In that case the plaintiff was allowed to recover from the city salary from the time judgment of ouster against the incumbent was pronounced, although the plaintiff rendered no personal service and the salary had been paid to the intruder. In the *Dolan* case, *supra*, the claimant recovered the salary unpaid during the time Keating discharged the duties of the office. The provisions of the Revised Statutes to which reference has been made, allowing the recovery of damages by the officer *de jure* against an intruder, proceed upon the assumption that the former may recover of the latter what he has lost by the usurpation. The revisers in their note upon this subject (5 Edm. Stat.

774), say that it was intended to enlarge the scope of the remedy by information, so as "to provide for the recovery of the fees by the defendant." The exclusion of a *de jure* officer from his office is a legal wrong committed by the intruder. In a legal view it is immaterial that the defendant may have acted in good faith, or that he supposed he had the better title. A good motive is not an adequate answer to a claim for indemnity for a violated right. There is a great preponderance of authority in support of the doctrine that the *de jure* officer can recover against an intruder the damages resulting from the intrusion, and that as a general rule the salary annexed to the office and received by the defendant measures the loss. *Dolan v. Mayor, etc., supra*; *Lawlor v. Alton*, L. R., 8 Ir. 160; *Glascock v. Lyons*, 20 Ind. 1; *Douglass v. State*, 31 Ind. 429; *People v. Miller*, 24 Mich. 458; *Dorsey v. Smith*, 28 Cal. 21; *Segan v. Crenshaw*, 10 La. Ann. 239; *U. S. v. Addison*, 6 Wall. 291. But as a final point the defendant invokes for his protection the doctrine which protects rights acquired on the faith of a judgment, notwithstanding its subsequent reversal. We think the doctrine is inapplicable to the case. The appointment of the mayor and the defendant's assumption of office thereunder, made him an officer *de facto* merely. "An officer *de facto*," says Chancellor WALWORTH, "is one who comes into a legal and constitutional office, by color of a legal appointment or election to that office." *People v. White*, 24 Wend. 518, 539. The proceeding of the mayor in removing Nichols, was so far judicial as to authorize it to be reviewed on *certiorari*. It was not a proceeding in a court of justice under the forms and solemnities of judicial proceedings in courts, to establish the rights of litigants. The defendant did not acquire his title to the office under the so-called judgment rendered by the mayor, but under a separate and distinct proceeding subsequent thereto, by which the defendant became invested with the character of an officer *de facto*. It is abundantly settled by authority that an officer *de facto* can as a general rule assert no right of property, and that his acts are void as to himself, unless he is also an officer *de jure*. *Greene v. Burke*, 23 Wend. 490; *People v. Nostrand*, 46 N. Y. 375; BRONSON, J., in *People v. Hopson, supra*. In Oro. Eliz. 699, the doctrine is tersely stated: "The act of an officer *de facto*, when it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be conusant of; but where it is for the benefit of strangers, or the

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public, who are presumed to be ignorant of such defect of title, it is good." I have been unable, after a diligent examination, to find any case which sustains the claim that an illegal exercise of the power of appointment to office, by an executive officer, to fill an assumed vacancy, confers additional protection upon the appointee, because coupled with the fact of a prior summary removal of the rightful incumbent by the same officer, in the exercise of a *quasi* judicial discretion. In the *Dolan* case, *supra*, the appointment of Keating was made under an ambiguous statute, under a claim of right, and was regular in form, but the court were of opinion that this would not protect him against a suit by the officer *de jure* to recover the salary received by him. We think there is no solid distinction between the cases. The defendant took the risk of the validity of his title, and the loss should fall upon him rather than upon the plaintiff.

Upon the whole case we are of opinion that the judgment should be affirmed.

Judgment affirmed.

All concur, except RAPALLO and MILLER, JJ., not voting.

SCHMITTLER V. SIMON.

(101 N. Y. 554.)

Executor and administrator — acceptance of draft — personal liability.

A draft was drawn on "A. S. executor," for a certain sum at a specified date, with interest, and containing the direction to "charge the amount against me and of my mother's estate." The defendant accepted, simply adding the word "executor" to his signature. *Held*, that he was liable individually.

ACTION on a draft. The opinion states the case. The defendant had judgment below.

Wm. W. Jenks, for appellant.

Joseph B. Reilly, for respondent.

RUGER, C. J. The plaintiff claimed to recover as the holder of a draft, drawn upon and accepted by the defendant, reading as follows:

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“NEW YORK, *February 26, 1877.*”

“Mr. Adam Simon, executor, will please pay to Johannes Schmittler or his order, on the first day of July, which will be in the year 1879, the sum of \$900, with seven per cent interest, to be paid besides this amount yearly, July month, and charge the amount against me and of my mother's estate.

“WILLIAM J. SCHAREN.”

Written upon the face: “Accept, Adam Simon, executor,” and indorsed, “Pay to the order of Mary Schmittler, the amount of note.
JOHANNES SCHMITTLER.”

Upon the trial, after proving the execution of the draft, its acceptance and transfer, and offering to prove the payment of a consideration by the plaintiff to the payee, which was objected to by defendant, and excluded by the court, the plaintiff rested. The defendant thereupon moved to nonsuit upon the ground that the obligation was not binding upon the defendant personally, but he was liable thereon, if at all, in his representative character alone, and that it was payable out of a specific fund, and a recovery thereon could not be had without proving the existence and extent of such fund. The court thereupon nonsuited the plaintiff, to which decision she excepted. The General Term having affirmed the determination of the trial court, the plaintiff took this appeal.

We think the court below erred as to both of the grounds upon which their judgment proceeded. That the defendant was liable upon the draft, if liable at all, in his individual capacity alone, seems under the authorities to admit of no doubt.

Neither executors nor administrators have power to bind the estate represented by them through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the personal property as owners and have no principal behind them for whom they can contract. The title vests in them for the purposes of administration, and they must account as owners to the persons ultimately entitled to distribution. In actions upon contracts made by them, however they may describe themselves therein, they are personally liable, and in actions thereon the judgment must be *de bonis propriis*. Not so however upon contracts made by their testator or intestate; in such case the judgment is always *de bonis testatoris*. *Gillet v. Hutchinson's Adm.*, 24 Wend. 184; *Ferrin v. Myrick*, 41 N. Y. 815; *Austin v. Monroe*, 47 N. Y. 360, 366.

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The action here is exclusively upon the undertaking of the defendant, importing a promise to pay the sum of \$900 on the 1st day of July, 1879, to the payee of the draft or his order for a consideration received by the promisor. No facts are alleged or proved, showing any liability on the part of the defendant's testator to the drawee of the draft, or any legal demand existing in his favor, against the estate represented by the defendant.

It follows that the obligation must be held to be the individual contract of the defendant, and enforceable as such by a judgment against him, and execution to be levied *de bonis propriis*, or it is *nudum pactum* creating no liability whatever.

The cases are very numerous to the effect that the addition of an official character, to the signatures of executors and administrators, in executing written contracts and obligations has no significance, and operates merely to identify the person and not to limit or qualify the liability. Thus it was held in *Pinney v. Adms. of Johnson*, 8 Wend. 500, that a bond given by administrators in their representative capacity to a creditor for a debt of their intestate was the individual obligation of the administrators and enforceable against them *de bonis propriis* only; that the description of the obligors in the bond as administrators, and their promise in that character, was surplusage, and they were chargeable upon such a bond only in their personal capacity. See also *Gould v. Ray*, 13 Wend. 633. Parsons on Bills and Notes, vol. 1, page 161, lays down the rule that "an administrator or executor can only bind himself by his contracts; he cannot bind the assets of the deceased. Therefore if he make, indorse or accept negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office; signing a note for example, 'A., as executor of B.,' for this will be deemed only a part of his description or will be rejected as surplusage." To similar effect are *Pumpelly v. Phelps*, 40 N. Y. 59; *Taft v. Brewster*, 9 Johns. 334; *Forster v. Fuller*, 6 Mass. 58; *Hills v. Banister*, 8 Cow. 31; *Thatcher v. Dismore*, 5 Mass. 299; *Cornthwaite v. First Nat. Bank*, 57 Ind. 268.

Being of the opinion therefore that the defendant is liable upon the draft in question in his individual capacity alone, the question still remains as to the extent of such liability. He was undoubtedly competent to enter into a personal contract in reference to the funds in his possession, and in such case would be bound to perform according to the tenor and legal effect of the obligation as-

sumed by him, and entitled to be allowed the amount paid upon an accounting as executor. Such instruments are subject to the rules of construction applicable to other contracts, and must be interpreted upon consideration of the language used by the parties, with a view of arriving at their intention in executing them. The court below held that the draft in question was payable only from a particular fund, and was therefore non-negotiable, and enforceable only to the extent of the fund referred to.

Considering the question, as we are compelled to do, from the language of the instrument alone, we are unable to agree to the interpretation thus put upon it. It is not claimed that there is any distinction between the instrument in question and an ordinary bill of exchange except that made by the clause referring to the mother's estate. Unless that clause deprives the paper of its commercial character, the rights and liabilities of the parties thereto must be governed by the rules pertaining to negotiable securities, which would render the defendant liable for the amount named in the draft, upon the theory that his acceptance was an admission by him of assets applicable to its payment.

The distinction between a fund from which a draft or order is directed to be paid, and one referred to as the means of reimbursement to its drawee, is a material one and cannot be disregarded in the construction of such instruments. Thus it is said: "When a reference is made to a special fund merely as a direction to the drawee how to reimburse himself, and the payment is not made to depend upon the adequacy of the fund, it will not vitiate the bill." Edw. on Bills and Notes, § 158. See also Pars. Merc. Law, 87; Chitty on Bills, 158. DWIGHT, Com., in *Munger v. Shannon*, 61 N. Y. 255, says: "A bill is an order drawn by one person on another to pay a third a certain sum of money absolutely and at all events. Under this definition the order cannot be paid out of a particular fund, but must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee may reimburse himself." Judge RAPALLO, in *Brill v. Tuttle*, 81 N. Y. 457; s. c., 37 Am. Rep. 515, says: "If a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such pay-

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ment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts." In that case the drawee refused to accept and the action was sought to be maintained upon the theory of an equitable assignment. It was held under the peculiar circumstances of the case, and the form of the instrument, that it did transfer the fund.

It is thus seen that the mere mention of a fund in a draft does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise.

The question therefore to be determined here is, whether the fund in question is referred to as the measure of liability or the means of reimbursement. While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it is mentioned only as the source of reimbursement. No express language in it can be pointed out as requiring its payment from the fund mentioned, and none from which that requirement can be implied, except such as exists in all drafts where a fund is referred to. Its language is to "charge the amount against me and of my mother's estate" and contains no provision for delay until the amount is realized from the estate, or for payment *pro tanto* in case the estate should prove insufficient to pay the whole amount. There is no language importing a transfer of the fund to the payee, and nothing from which such an intention can be inferred. The draft contains an absolute direction to pay a fixed sum, at a specified date, with interest. It imports a present indebtedness of a sum named, from the drawee to the payee, and an absolute direction to pay that sum at a fixed date, subject to no contingency either as to the time or amount. In express language he directs the amount when paid to be charged against him individually, and adds the words, plainly implying, as we think, that the fund for the acceptor's reimbursement would be found in an amount eventually, or immediately payable to the drawer from his mother's estate.

We think also that the insertion of words expressly making the paper negotiable was quite significant and indicated an intention on the part of all parties, that it should be transferable, and partake of the character of commercial paper. Any contingency inferable from the language of the draft, making the amount pay-

able thereon indefinite and uncertain, would tend largely to depreciate its value for such purpose, and defeat the intention with which it was apparently made.

If the language of the paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him, but as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and we think, should be held to the contract which other parties were authorized by his acceptance to infer he intended to make. The case of *Tassey v. Church*, 4 W. & S. 374; s. c., 39 Am. Dec. 65, seems quite in point. The instrument there read: "\$555.48. Allegheny, 1st July, 1840. "Please pay Church, McVay & Gordon \$555.48 and charge the estate of Thomas C. Patterson." "Adam Flemming, *Trustee*." "To John Tassey, Administrator." Indorsed: "Accepted, John Tassey, Administrator."

Fleming was the trustee of Mrs. Patterson, who was the heir-at-law of Thomas C. Patterson; Tassey was administrator of Patterson's estate. It was held that the promise of the acceptor was unconditional and bound him absolutely. In *Childs v. Monins*, 6 Eng. C. L. 228, the defendants, as executors of the estate of Thomas Taylor, promised to pay £200 on demand with interest, signing as executors. It was held that they became personally liable, and that the plea of *plene administravit* was no defense. It was further held that the promise to pay interest made the debt that of the administrators personally. In *Kelly v. Brooklyn*, 4 Hill, 263, the action was upon an order drawn by the mayor upon the treasurer of defendant in the following words: "Pay Alexander Lyon or order \$1,500 for award No. 7, and charge to Bedford Road Assessment." It was held that it was a bill of exchange and not payable from a particular fund. For further illustration of the point under discussion we would refer to *Hollister v. Hopkins*, 13 Hun, 210; *Redmond v. Adams*, 51 Me. 429; *Luff v. Pope*, 5 Hill, 413. The case of *Tooker v. Arnoux*, 76 N. Y. 397, is referred to by the respondent as sustaining the views of the court below; but we are of the opinion that it cannot be so regarded. The order there directed the drawee to pay a certain sum out "of the money to be realized from the sale" of certain houses. This order was accepted, and it was held that a sale of the houses was a condition precedent, to any liability on the part of the acceptor. This was the plain language of the contract.

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In all the cases examined by us where an order has been held to operate as an equitable assignment of a fund, there were either special phrases contained in the instrument, indicating an intent to have it so operate, or ambiguous language used, which construed in the light of surrounding circumstances, justified the inference of a limitation of liability. *Parker v. Syracuse*, 31 N. Y. 376; *Alger v. Scott*, 54 N. Y. 14; *Munger v. Shannod*, 61 N. Y. 251; *Ehrichs v. DeMill*, 75 N. Y. 370; *Brill v. Tuttle*, *supra*. Here however there is no such language, and this contract is to pay a fixed amount at a specified date, absolutely and unconditionally.

We are therefore of the opinion that the instrument in question is a bill of exchange and rendered the parties executing it liable absolutely for the amount stated therein.

The judgment of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

VIETS V. UNION NATIONAL BANK.

(101 N. Y. 502.)

Inanity — adjudication of — conflicting judgment — payment to committee — statute of limitations.

On the 19th of February, 1869, plaintiff, at the direction of John Banker, deposited money for him in defendant bank to plaintiff's own credit, and drew checks thereon and delivered them to Banker, who transferred them to Ellen Houghtaling in consideration of her promise to marry him. On the twenty-third of February, proceedings were commenced against Banker to declare him a lunatic, and the bank was enjoined from paying the deposit. On the thirty-first of March, Banker was adjudged a lunatic and to have been so for six months, and the bank was ordered to pay the deposit to his committee, and did so on the fourteenth of April. The checks were presented and payment refused in March and August. Banker married Ellen Houghtaling on the eighth of March, and died on the 14th of September, 1869. His committee brought an action to set aside the marriage on the ground of lunacy but it was adjudged that Banker was not of unsound mind at the time of his marriage, had lucid intervals afterward in which he recognized the marriage, and was of unsound mind when he died. In an action on the checks, *held* (1), that the payment by the bank to the committee was valid; (2), the judgment did not affect the previous adjudication of lunacy; (3), the cause of action was barred by the statute of limitations.

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ACTION for balance of a deposit. The opinion states the facts. The plaintiff had judgment below.

Jas. Lansing, for appellant.

R. A. Parmenter, for respondent.

MILLER, J. The controversy in this action arises in reference to certain moneys belonging to one John Banker, deceased, which were deposited with the defendant to the credit of the plaintiff. Previous to this time Banker was the owner of a bond and mortgage of about \$6,000, on a farm formerly belonging to him upon the sale of which the mortgage was executed. This mortgage he sold and received a check for the amount of the sale. On the 19th of February, 1869, the plaintiff, at Banker's request, took his check to the bank, and had it cashed and from the proceeds paid an overdue note upon which Banker was indorsed of about \$600, gave Banker when he returned about \$200, and on the same day deposited the balance, \$4,867.83, with defendant in his own name. He then, by direction of Banker, and on the same day, drew two checks payable to Banker, one for \$3,500 and the other for \$1,367, and delivered them to him. On the twenty-second of February these two checks were indorsed by Banker and delivered to one Ellen M. Houghtaling as part consideration for her promise of marriage with said Banker. On the twenty-third of February proceedings were instituted by David A. Banker, son of John Banker, in the nature of a writ *de lunatico inquirendo*, to inquire as to the lunacy of said John Banker, and a commission issued directing an inquisition to be held, and by virtue of said inquisition held March tenth, it was adjudged that Banker was of unsound mind and incapable of governing himself or managing his property and had been in such state of lunacy for a period of six months. Pending the proceedings an order was made by the court enjoining the bank from paying over to any one the money deposited with it until further order of the court. On the thirty-first of March, an order was made confirming the inquisition and directing the bank to pay over the money deposited to David A. Banker as committee of John Banker, and on the fourteenth of April the defendant, on receiving an indemnity bond, paid over to the committee accordingly. On the 6th of March, 1869, the check for \$3,500 was presented to the bank for payment and

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payment refused, and on the 28th of August, 1871, the check for \$1,367 was likewise presented for payment, and payment refused. On the 8th of March, 1869, John Banker was married to Ellen M. Houghtaling. After the above named two checks were presented to the bank for payment, and payment refused, Mrs. Banker recovered a judgment against the plaintiff for the amount of the same. Banker died on the 14th of September, 1869, and after his decease an action was brought in the Supreme Court by his committee to set aside his marriage on the ground of his alleged lunacy. On the trial of the action, February 24, 1870, it was found that at the time of his marriage, March 8, 1879, Banker was not of unsound mind; that after his marriage he had lucid intervals, and in such lucid intervals recognized such marriage by cohabitation and otherwise, and that at the time of his death he was not of sound mind, and judgment was entered in accordance with these findings.

The plaintiff's right to recover in this action does not rest upon the ground that he was owner of the money deposited in the bank or had any absolute title to the same. It clearly did not belong to him, and if this action can be maintained, it must be for the reason that the deposit in his name with the consent of Banker and the making and delivery of the checks under the circumstances stated, conferred upon him the right to enforce payment thereof against the bank.

As the money in the bank belonged to John Banker and the deposit was made by his direction, it mattered not that the deposit was made to the plaintiff's individual account, and in an action brought by the principal the bank could not set up a want of privity. *Van Alen v. Am. Nat. Bk.*, 52 N. Y. 1. We must therefore assume that the money deposited by the plaintiff was the property of John Banker while it remained in the possession of the defendant.

Such being the case the question arises whether the payment which was made by the bank to the committee, who had been appointed by the Supreme Court in the proceedings against Banker as a lunatic, was a legal payment which discharged the bank from liability and bars the plaintiff's right to maintain any action for the same.

The law makes provision for the appointment of a committee of the personal estate of a lunatic and vests in such committee the right to possession of the estate, and after an adjudication of lunacy has been made and confirmed by the court, and a committee

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of his estate duly appointed and qualified, such committee occupies the same position and fills the same place as the lunatic in regard to his personal estate and property. He has the same control and possession thereof, and in all ordinary matters the right to deal therewith, as the lunatic enjoyed before he was found to be of unsound mind. The committee is the representative of the lunatic in respect to all matters connected with his estate.

When therefore on the 10th of March, 1869, in proceedings had against John Banker, the regularity of which is not disputed, a judgment of lunacy was obtained against him, and thereupon subsequently a committee appointed to take charge of his estate, he, Banker, became divested of all right to control his property in accordance with the findings under the inquisition had. That inquisition determined not only that he was a lunatic on said 10th day of March, but that he had been such for a space of six months previous. A short time after that, the committee who had been duly appointed and qualified, applied to the defendant as the representative of Banker, to whom alone the money deposited by the plaintiff belonged, and exhibiting his authority, demanded payment of the money and it was paid to him. Banker, who was the owner of the money, had no right to receive it, because he had been declared a lunatic and the committee was the only person whom the law recognized as having authority for such a purpose.

Even if it be assumed that there was an equitable right in Mrs. Banker to the money arising out of the ante-nuptial contract with her husband, such equity cannot be invoked as against the bank that had no notice of the same, and in good faith paid the money to the legal representative of the owner thereof. The bank is entitled to protection for the reason that it paid the money to one who apparently had the right to receive it. If any equitable claim existed in favor of any third party, it could only be prosecuted and enforced in an action against the committee who had received the money and not against the bank in contravention and repudiation of its right to pay which it had exercised in good faith to one ostensibly vested with lawful authority to receive the same. With this apparent lawful authority presented by the committee to the bank, it was not required to examine and determine the equities of other parties, of which it had no knowledge, to the fund, and it had a right to assume that the committee appointed by the court had full power to act. It must be conceded that if the adjudication of

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lunacy was in force at the time the payment was made, it was a valid and legal payment and an effectual bar to any claim by the plaintiff or any other person to recover the money of the defendant. Such adjudication however is assailed by the respondent's counsel, and it is insisted that the question of lunacy is out of the case because it was shown that the presumption of lunacy arising from the inquisition in the lunacy proceedings against John Banker had been overcome and wiped out by the subsequent judgment in the equity suit brought by David A. Banker, the committee, against Ellen M. Banker, to declare the marriage contract null and void, whereby it was adjudged that at the time of his marriage on the 8th of March, 1869, John Banker was not a person of unsound mind, and therefore he must be regarded, for the purposes of this appeal, as a person of sound mind fully capable of managing his affairs and disposing of his property at the various times during which the transactions, out of which this controversy arose, transpired. We do not think that such was the effect of the judgment in the action referred to, and all that was established thereby was the sanity and ability of Banker to enter into the marriage contract on the eighth of March, two days before the inquisition was held adjudging him a lunatic.

The other findings in the case, as we have seen, evince that Banker was of unsound mind after the eighth of March and at the time of his death. None of them are in conflict with the general finding of the inquisition that he was of unsound mind for six months prior to the time it was held. The only fact that was established by the verdict and judgment in the action to set aside his marriage was the sanity of Banker at the time he entered into the marriage contract, and this is entirely consistent with the finding of the inquisition that he was a lunatic two days afterward, and with the fact that he was such on the twenty-second of February, when the alleged transfer of the checks was made to Mrs. Banker.

It cannot, we think, be denied, in view of all the circumstances, that the judgment in the action referred to only covered the day of Banker's marriage, to which alone it had reference. This is entirely apparent from the previous inquisition, which had adjudged that he was a person of unsound mind and a lunatic long prior to his marriage. He was found to have been a lunatic for several months prior to that time by the first adjudication, and by the second that he was sane at the time of his marriage and had lucid intervals, but

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was of unsound mind at the time of his death. Taking all these facts in connection, there is no ground for claiming that Banker was not of unsound mind for a long period anterior to his marriage and after the same, with lucid intervals to the day of his death. Such being the case, the last adjudication could not affect the conclusion arrived at upon the inquisition and the appointment of the committee by reason thereof. To all intents and purposes during these transactions, with the single exception of the day of his marriage, Banker was a person of unsound mind, incapable of managing his affairs, and his acts during the transactions referred to were invalid and liable to be set aside on account of his lunacy. Whatever rights therefore existed in favor of Mrs. Banker or of the plaintiff could only be vindicated by an action to obtain the money from the committee to whom it had been lawfully paid. Neither of these parties could ignore the effect of the findings upon the inquisition against Banker by an action against the defendant. Their remedy, if any existed, lay in a different direction, as we have seen, and it cannot be obtained in this present action.

It follows that the order appointing the committee, upon the findings of the inquisition, having been made by a tribunal that had jurisdiction of the person and property of the said John Banker, was binding upon Banker and his privies and sufficient to authorize the payment by the bank to the committee, and that the court erred in holding the defendant liable to the plaintiff for the amount of the two checks deposited with it by the plaintiff.

We are also of the opinion that the plaintiff's right to recover in this action, which was brought in 1878, was barred by the statute of limitations.

While it is true that a check drawn against a general bank account does not operate as an assignment, and that as a general rule the holder cannot maintain an action against the drawee because of want of privity, it is equally true that the giving of a check authorizes the payee, or some person taking the check, to make demand of payment, *Bk. of British N. Am. v. Merchants' National Bk.*, 91 N. Y. 106, 111, and the refusal to pay on presentation of the check, which presentation is equivalent to a demand of payment, gives to the drawer a right of action, in case he has funds in the bank to meet the check, and the refusal to pay was without his authority.

It appeared indisputably, and is substantially found by the trial

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court, that the two checks given by plaintiff to Banker and by him indorsed to Ellen M. Houghtaling, were presented to the bank, defendant, for payment, and payment refused, the one in March, 1869, the other in August, 1871. At the time of such refusal there was written upon one of the checks "Payment refused" and upon the other "no funds." It is to be presumed, at least so far as plaintiff is concerned, that the person presenting the checks had the right so to do, and nothing is shown to the contrary; such being the case, the bank became liable when presentation was made for the amount of each check, and payment of the same was refused.

We think that a demand for the whole balance on deposit is not requisite in order to enable the depositor to maintain suit against the bank. The implied contract between a bank and its depositor is that it will pay the deposits when and in such sums as are demanded. Whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive its amount, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises. For the balance no suit can be brought until demand is made. In other words, the depositor has the election to make the whole claim payable at one time by demanding the whole, or in installments by demanding portions thereof, and it would be a novel doctrine that when the claim has thus been made payable in installments, no action could be brought for an installment which has become due and payable, because there is a residue of the claim not due.

But again, the general rule above stated, i. e., that the holder of a check cannot maintain an action against the drawee, is not applicable to this case. The money deposited by plaintiff belonged to Banker, and the deposit in the bank was made by his direction. It matters not that the deposit was made to his, plaintiff's, individual account, and in an action brought by the principal against the bank, upon refusal to pay his agent's check, the bank cannot set up a want of privity. *Van Allen v. Am. Nat. Bk.*, 52 N. Y. 1.

Banker, to whom the money belonged, or any person to whom he had transferred his claim against the bank, could have maintained an action on presentation and refusal to pay the checks, and upon demand and refusal the statute began to run.

The claim made by the respondent's counsel, that if the action had been barred by the statute of limitations it was revived by the payment by the bank of the two checks of the plaintiff, one on

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December 2, 1872, of \$18.82, and the other on March 27, 1873, of \$4.33, and that the defendant was thereby estopped from interposing the defense of the statute of limitations until six years after that, is not well founded. The amount of these two checks constituted the balance which was due to the plaintiff from the defendant for moneys deposited on his own account separate from the moneys belonging to Banker for which the checks in question in this action were drawn. As the depositor has a right to draw his check for separate portions of the money belonging to him on deposit and a cause of action arises upon presentation and refusal to pay such check, the payment of the checks drawn after those which are the subject of controversy in this action, could not affect the cause of action which arose upon their presentation to the bank and its refusal to pay. The payment of the two checks referred to did not authorize the conclusion that the defendant intended to recognize the fact that the other checks were still a subsisting indebtedness against which the statute had not commenced to run, but such payments were entirely separate and independent transactions, having no reference whatever to the checks in suit. Under the facts there is no ground for claiming that the payment of the checks of December 2, 1872, and March 27, 1873, was a recognition of any indebtedness beyond them, and operated as a revival of the debt and prevented the statute from running.

The respondent's counsel also claims that under subdivision 3, section 414, of the Code of Civil Procedure, a person entitled to commence an action when the Code took effect might commence such action before the expiration of two years after the Code should go into effect, and that as the Code went into effect May 1, 1877, he had until May 1, 1879, to bring his action before it would be barred by the statute of limitations. We do not understand such to be the rule under the provision cited, which declares that a person entitled under said section to bring an action when the Code took effect, where he commences the same before the expiration of two years after the Code took effect, his action is governed by the same law applicable thereto immediately before the Code went into effect. This provision of the Code only left actions brought within two years to be governed by the law applicable to the case at the time the Code went into effect, and in no way operated to extend the time for the application of the statute of limitations. It remains in force the same as before the enactment of the Code.

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There are other questions in the case, but in view of the conclusions already arrived at, their examination is not necessary.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

EARL, DANFORTH and FINCH, JJ., on both grounds discussed in the opinion; ANDREWS, J., on first ground; RUGER, C. J., on second ground. RAPALLO, J., absent.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

SMITH V. STATE.

(64 Md. 25.)

Evidence — cross-examination — impeaching questions.

On a trial for murder a witness was asked, under objection, if he had ever been confined in jail. The court instructed the witness that he was not bound to answer, and he refused to answer. *Held*, that there was no error in allowing the question to be put.

CONVICTION of murder. The opinion states the case.

Edwin Linthicum, Sidney Hall, and Thomas C. Ruddell, for appellant.

Jos. D. Maguire, and Charles B. Roberts, attorney-general, for appellee.

IRVING, J. Upon the trial of the appellant for murder, a witness for the defense was asked on cross-examination this question: "State if you have ever been confined in the Baltimore city jail? The counsel for the prisoner objected, but the court overruled the objection, and allowed the question; but the court instructed the witness that she was not obliged to answer the question. The wit-

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ness did refuse to answer, and the counsel for the defense excepted because the question was allowed to be put. Whether the Circuit Court was right in so ruling is the sole question for our decision.

The subject has been much discussed in the books, and many conflicting decisions have been made; and many judges have gone further than the court did in this instance, and have required an answer unless it was made clearly to appear, that the answer would subject the party to danger of prosecution, or be a possible link in the evidence against him. The theory upon which such inquiry has been allowed is, that the credibility of a witness is always in issue, and therefore any thing which will tend to throw light upon his character in that regard may always be inquired into. In *Cundell v. Pratt*, 1 Moody and Malkin, 108, BEST, C. J., said he should always "protect witnesses from questions the answers to which would expose them to punishment; but if they were protected beyond this, from questions that tended to degrade them, many an innocent man would unjustly suffer." In *Real v. People*, 42 N. Y. 270, the court said their conclusion was "that a witness upon cross-examination may be asked whether he was in jail, the penitentiary, or the State prison, or any other place that would tend to impair his credibility; and how much of his life he had passed in such places. When the inquiry is confined as to whether he has been convicted, and of what, a different rule may perhaps apply. This involves questions as to the jurisdiction and proceedings of a court of which the witness may not be competent to speak." The court added that this latter was the point involved in *Newcomb v. Griswold*, 24 N. Y. 298, which was relied on by the appellant here. It is thus distinguished in principle and does not apply to this case. In *Real v. People*; the court said, "the extent of the cross-examination of this character is somewhat in the discretion of the court, and must necessarily be so to prevent abuse." If this were not so, the whole range of a man's life might be traversed and the possibility of reformation and restoration to respectability, and credibility would be excluded. If the witness desires protection from an unwarrantably prejudicial inference from the fact inquired about he can explain; and even if it be a conviction in another State put in evidence to affect his credibility, he may explain the circumstances of that conviction. Whart. Cr. Ev., § 474, and note, and §§ 489 and 596. In section 474 it is said "the tendency now is, if the question be given for the purpose of honestly discrediting, to

require an answer." In the leading case of *Frost v. Holloway*, cited by Wharton in section 474, Lord ELLENBOROUGH compelled an answer to a question whether the witness "had been confined in jail for theft." The only question before us is whether the question may be asked, and not whether answer may be compelled, and we have only referred to that case to show how much further some courts have gone than was done in this case. There are two cases in 4 Esp. N. P. C. which countenance the exclusion of the question. *Rex v. Lewis*, 225, and *Macbride v. Macbride*, 242; but they do not seem to have been much followed; and Mr. Phillips in the 1st volume of his work on Evidence, pages 282 and 283 (4th Am. ed. from 7th Eng. ed.) says there are very many other cases wherein such questions have been allowed; and in the note on the pages cited, the cases of *Rex v. Lewis*, and *Macbride v. Macbride* are commented on, as being cases where the witness was protected from danger and unnecessary degradation only. Whether this was so or not the current of decision is the other way, and the same author says, "the common practice of courts before most approved judges will abundantly furnish instances of such questions being asked, and not being disallowed as contrary to rules of law; and it is difficult to see how such a question can be properly deemed illegal, when, if the witness chooses to answer, his answer must undoubtedly be received as evidence."

Mr. Roscoe, in his Digest of Evidence at Nisi Prius (12th Eng. ed.), 174, says the weight of authority allows such questions to be put, and adds that "preponderance of opinion is in favor of the position, that the judge is to exercise his discretion whether he will grant the privilege (of declining to answer) upon the bare claim of the witness, or will investigate the claim by further inquiry." The witness is clearly entitled to protection, if asked for by him, and the court thinks he is endangered or will be unnecessarily degraded. In Greenl. on Ev., § 451, this view is maintained, and the same general view runs through all the text-books. In notifying the witness in this case that she was not obliged to answer, the court was as liberal to the witness and to the appellant as any recognized rule could require. There was certainly no error in allowing the question put.

Rulings affirmed, and cause remanded.

Green Bridge Railroad Company v. Brinkman.

GREEN RIDGE RAILROAD COMPANY V. BRINKMAN.

(84 Md. 52.)

Evidence — negligence — communication of fire by railroad — usage — burden of proof.

In an action against a railroad company for negligently setting fire to the plaintiff's premises, the plaintiff only proved that the fire originated near the track, and shortly after the passing of a train, and that recently the same engine had been seen to drop glowing cinders and to start other fires. The defendant offered to prove that it was an old custom of the farmers in that vicinity to set fire annually to the leaves and underbrush at that season to improve the pasturage. *Held*, (1) that the plaintiff's evidence was competent and sufficient to warrant a finding of negligence; (2) that the defendant's offer was incompetent.

ACTION of damages for setting fire to plaintiff's premises. The opinion states the case. The plaintiff had judgment below.

A. Hunter Boyd, and Ferdinand Williams, for appellant.

Benjamin A. Richmond and William Brace, for appellee.

YELLOTT, J. In the Circuit Court for Allegany county an action was instituted by the appellee against the appellant for the recovery of damages, the plaintiff averring in his declaration that he was the owner of a large quantity of tan-bark, corded wood, and other property, and that said property was destroyed by combustion resulting from a fire occasioned by the engines and locomotives of the defendant being negligently run and controlled on the line of its road. The evidence offered by the plaintiff tended to prove that the defendant owned and operated a railroad constructed through a country covered with forest, at the foot of Green Ridge mountain; and that on the 28th day of April, 1884, a fire was originated near said road by sparks from defendant's engines, which first extended to the lands of one Ryan and Frederick Brinkman, who in their efforts to avert the danger "trailed the fire" along the mountain ridge, more than a mile from their lands to the plaintiff's land; that the plaintiff, assisted by others, encountered and resisted the conflagration in the same manner until about three o'clock in the morning, when supposing that the flames had been subdued, he

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retired and returned at ten o'clock, about two hours after which time a fresh wind sprang up, carrying fire from the burning debris, ignited and destroyed the plaintiff's property, and thus occasioned the claim for damages which forms the foundation for this suit. The plaintiff offered evidence tending to prove that the method employed to subdue the fire was necessary and proper. He offered no direct proof that the fire was caused by the engine, but proved that the fire was seen some twenty feet from the track of the road about three hours after the engine had passed that point. The plaintiff also proved that within a month previous to the 28th day of April, 1884, said engine had been seen to start two other fires, and that on three occasions within that time glowing cinders were observed dropping from said engine.

The defendant offered to prove that among the farmers in that region, it was a custom or usage to set fire to the leaves and underbrush at that season so as to improve the pasturage; and that annually during many years before the defendant's road was built such fires had been started in that valley and the adjacent mountains. Upon objection from the plaintiff, the court refused to admit such testimony, but permitted the defendant to prove the existence of any other fires which had been started in that vicinity within a month before or after that which the plaintiff alleged was the cause of the destruction of his property.

The refusal of the court to admit evidence of a usage or custom as aforesaid forms the foundation of the defendant's first bill of exception. The defendant also excepted to the ruling of the court in granting the prayers of the plaintiff, and in rejecting its fifth and seventh prayers, and in modifying its third and sixth prayers. The defendant excepted especially to the plaintiff's prayers, assigning as a reason that there was no evidence legally sufficient to show that the defendant's engine started the fire mentioned in the declaration.

The question presented for determination in the first bill of exception relates to the propriety of the court's ruling in rejecting proof of usage and custom among the farmers in that locality. The fact of the existence of a certain custom or usage is sometimes admissible in evidence in an action involving the construction of contracts, because agreements may be supposed to have been made with reference to such known and established usages and customs as are not in conflict with the law of the land. Indeed as the common law is but an embodiment of ancient usages and customs having an ex-

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tended and general application, the customs and usages of a neighborhood may, to some degree, be regarded as a species of a local common law. But in the actions of this nature, evidence of usage or custom does not seem to be admissible. No authority has been cited to show that such evidence is proper and pertinent to the issue; and the decision of this court seems to be adverse to the ad-
duction of such proof. *Baltimore & Ohio R. R. Co. v. Shipley*, 39 Md. 255.

The four prayers of the plaintiff, which were granted by the court and excepted to by the defendant, are so slightly variant that they might with apparent facility have been condensed and embodied in a single instruction. The first enunciates the proposition that if fire was communicated by defendant's engine, there must be a finding for the plaintiff, unless there was no negligence on the part of the defendant, or unless there was negligence on the part of the plaintiff. The second prayer declares that fire so communicated is *prima facie* evidence of negligence on the part of the defendant. In the third prayer the jury are told that if the defendant's engine, at the time of the fire complained of, "habitually scattered sparks," so as to endanger combustible material along the line of the road, it is a fact from which they may find negligence on the part of the defendant. In the fourth prayer the jury are told that if they believe from the evidence that the fire originated from the defendant's engine, then in order to exonerate the defendant they must find that said defendant exercised reasonable care and diligence, by having its engine properly constructed and in the charge of skillful and proper persons. The first, second and fourth of these prayers are based upon the hypothesis that the jury believe that the fire was communicated by the defendant's engine. When a fire so originates, the law creates the presumption of negligence, and the *onus probandi* is on the defendant to show the contrary. Md. Code, art. 77, § 1.

This court has said that "it is not incumbent on the plaintiff, in an action of this kind, to prove that the fire was caused by the defendant's negligence; but the *onus* is cast on the defendant to disprove negligence on its part, or rather to show affirmatively that it has used reasonable care to prevent causing injury by fire from its engines." *Annapolis & E. R. Co. v. Gantt*, 39 Md. 137; *B & O. R. Co. v. Shipley*, 39 Md. 251; *Balt. & Susq. R. v. Woodruff*, 4 Md. 242; s. c., 59 Am. Dec 72.

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In the plaintiff's third prayer the jury are told that if they believe from the evidence that the engine "habitually scattered sparks to such an extent as to endanger combustible material along the line of the road," it is a fact from which they may find negligence on the part of the defendant. In *Gantt's* case, in 39 Md. 135, a witness stated that he had seen the engines "scattering large sparks in passing, capable of setting fire to combustible articles along the road; and that about a week before he had put out a fire in the leaves caused by these sparks; but he could not say that he had ever seen any such sparks from the locomotive that was drawing the freight train the morning of the fire."

Chief Judge BARTOL, in delivering the opinion of the court, said: "We entertain no doubt that this was competent and admissible evidence, both for the purpose of proving that the fire in question was occasioned by the locomotives, and as tending to prove negligence on the part of the defendant in the construction and management of its engines." The learned chief judge in support of these propositions cited the case of *Piggot v. Eastern Counties Ry. Co.*, 54 Eng. C. L. 228; and also referred to a number of American cases in which the same principle is enunciated.

The fifth prayer of the appellant was properly rejected by the court, because it contained no instruction which had not already been given to the jury in appellant's first prayer which had been granted. This remark is also pertinent to the appellant's seventh prayer, which was properly rejected, because it announced nothing more than that which was completely covered by his second prayer which was granted. The first and fourth prayers of the appellee also required the jury to find that the fire originated from the appellant's engine, before they could find a verdict for appellee. The reproduction and repeated presentation of the same legal proposition in various prayers by a mere transposition of phraseology, are not only unnecessary, but manifestly tend to confusion, and should not therefore be encouraged by judicial sanction.

Neither the third nor the sixth prayer of the appellant could be granted as originally presented, and even when considered as modified by the court, it may well be doubted whether the legal maxim *ad questiones facti non respondent iudices*, has not been ignored. But if error in this respect has been committed, it operated in appellant's favor, and he has no just cause for complaint. The questions presented by these two prayers have been settled by adjudication. In

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the case of the *Annapolis & Elkridge R. Co. v. Gantt*, 39 Md. 144, the court said: "In a case where the fire has not been communicated directly to the plaintiff's property by sparks or cinders from the locomotive, as where it had spread from its first beginning, and thus been communicated indirectly to the plaintiff's property, it is a question proper to be submitted to the jury to determine, from all the facts of the case, whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by some intervening force or power, which stands naturally as the cause of the misfortune."

The doctrine here announced is recognized and sanctioned by the decisions in other States. *Oil Creek & Allegheny R. Co. v. Keighron*, 74 Penn. St. 316; *Perley v. Eastern R. Co.*, 98 Mass. 419; *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 278; s. c., 12 Am. Rep. 689; *Higgins v. Dewey*, 107 Mass. 496; s. c., 9 Am. Rep. 63; *White v. Colorado Cent. R. Co.*, 5 Dill. 428.

In the third and sixth prayers of the appellant the court is asked to say to the jury that if there were certain intervening forces in operation as specifically set forth in the instructions sought to be obtained, then the plaintiff was not entitled to recover. Now in the case just referred to in 39 Md. this court has said that the jury must "determine from all the facts in the case whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by some intervening force," etc. It seems quite clear that the court was right in refusing to grant these prayers as presented by the appellant.

There being no perceptible error in any of the rulings of the court below which could injuriously affect the appellant, the judgment in this cause should be affirmed. *Judgment affirmed.*

TAYLOR V. MAYOR, ETC., OF CUMBERLAND.

64 Md. 68.)

Municipal corporation — negligence — coasting in streets.

SUFFICIENTLY reported, 51 Am. Rep. 860.

Smith v. Silver Valley Mining Company.

SMITH v. SILVER VALLEY MINING COMPANY.

(84 Md. 85.)

Corporation — acceptance of charter — requisites.

A charter was granted to a corporation by the legislature of North Carolina. The incorporators named held their first meeting in Baltimore, Maryland, and accepted the charter. *Held*, an invalid acceptance, and that the corporation had no legal existence.

BILL to set aside forfeiture of corporate shares. The opinion states the case. The bill was dismissed.

William S. Bryan, Jr., and William M. Merrick, for appellant.

N. Penniman Bond and Rufus W. Applegarth, for appellees.

MILLER, J. The charter of the "Silver Valley Mining Company" was granted by the legislature of North Carolina by an act which was ratified on the 15th of February, 1861. The title of this statute is "An act to incorporate the Silver Valley Mining Company, in the county of Davidson." By the first section it is enacted that five named persons and "their associates, successors and assigns, be and they are hereby created and constituted a body politic and corporate, by the name and style of the Silver Valley Mining Company, for the purpose of working, mining, and exploring for silver, gold, copper, iron and all other metals and minerals, and for mining, rending, smelting and working the same, and by that name may sue and be sued." "May have a common seal, and may enjoy all the privileges and powers incident to mining or smelting corporations, and may also purchase, hold and convey any real or personal property or estate as capital stock, to the amount of one million of dollars."

The second section provides "that the said corporation may divide their stock into such number of shares, and may provide for the sale and transfer thereof in such manner and form as said corporation shall from time to time deem expedient, and may levy and collect assessments, forfeit and sell delinquent shares, declare and pay dividends on the shares, and may make, alter and repeal such by-laws and regulations as said corporation may deem necessary, not repugnant to the laws of this State and of the United States."

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The third section makes it "lawful for the said corporation to be managed by three or five directors, two of whom at least shall be residents of this State, who shall have power to fill vacancies in their own body, shall continue in office until others are elected or appointed, and shall exercise all such rights as by this act are conferred and granted; but the stockholders shall have the right to elect said directors annually." By the other sections it is enacted that the aforesaid five named corporators "shall manage the affairs of said corporation as directors until others are elected or appointed," that the "corporation shall exist for thirty years, and that this act shall be in force from and after its ratification."

The appellant, by his bill in this case filed in February, 1880, avers that in March, 1869, he became the holder of a certificate which justly and legally entitled him to the ownership of 1,800 shares of the capital stock of this corporation, each of greater value than one dollar, and his complaint is that at a meeting of the directors held in Baltimore in February, 1879, a resolution was passed imposing an assessment of two cents a share, and declaring that if this was not paid before the thirty-first of March following, the stock on which it was not paid should be forfeited to the corporation and sold for its benefit, and that his stock was under this assessment declared forfeited, and the form of a sale thereof had. He charges that the directors had no right to hold a meeting for this purpose out of the State of North Carolina, and that their proceedings in the premises were wholly void; that he had no notice of the proceedings of this meeting until many months afterwards though he was and has been for many years a resident of Baltimore, and that the directors and other authorities of the corporation did not wish their said proceedings to be known by him; that no suitable or effective means were taken to give notice thereof even by advertisement in the public papers, the same having been, as he is informed, published in a paper which he does not take and very seldom sees; that the pretended sale of his stock was made to Wilkins, the president, and Denison, the treasurer of the corporation, and that these pretended proceedings of forfeiture were carried out by their influence, co-operating with other persons who are unknown to him; that shortly after these proceedings came to his knowledge, he made, through his counsel, a formal tender to the president of the amount of the assessment with interest thereon, and demanded to be reinstated in the possession and enjoyment of

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his stock, but this demand was refused; that all these proceedings purporting to forfeit his stock are merely illusory, have been carried out for the benefit of Wilkins and Denison, officers of the corporation as aforesaid, and that they are not only void in law by reason of holding the meeting beyond the limits of the State which granted the charter, and by reason of the attempt to deprive him of his property without notice, in contravention of the first principles of justice, and of the organic law of the State of North Carolina, as it existed at the time this corporation was chartered, but that they are by reason of the facts above stated inequitable, unjust and in fraud of his rights.

The bill then prays that the company and Wilkins and Denison may severally answer under oath, and set forth explicitly and fully the proceedings whereof the forfeiture of his stock is alleged to have occurred, and may discover when, by whom, and to whom it was sold and at what price, who is now the holder or ostensible holder thereof, and for whose benefit and interest the same is held, why they did not give greater publicity to their said proceedings, and the names of the persons who combined and co-operated with them in the formation and consummation of the attempt to forfeit his stock, if any such persons there be, and to whose benefit the supposed forfeiture and sale have inured; that these proceedings of the corporation may be declared to be null and void, that the supposed forfeiture and sale may be annulled, that he may be reinstated in the possession and enjoyment of his said stock; that the said company and Wilkins and Denison may be forever enjoined and prohibited from setting up this supposed forfeiture, and from claiming any benefit therefrom, and that he may have full and fair compensation from them on account of the premises, and for general relief.

All the defendants filed a demurrer to the bill, which was overruled. They then filed separate answers in which they put the complainant upon proof of his ownership of stock, deny all the charges of combination or fraud, set out the proceedings under which the forfeiture and sale were made, and insist that the same were duly and lawfully conducted, and are legal and valid. Proof was then taken, and upon the hearing the court below passed a decree dismissing the bill, and from that decree this appeal is taken.

It thus appears that one of the grounds upon which the bill assails the validity of the forfeiture is that the meeting of the direc-

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tors, at which the proceedings to that end were adopted, was not held within the limits of the sovereignty granting the charter, but another question is presented, and this goes to the corporate existence of this company at the time the appellant became a holder of its stock. The mere grant of a charter like this, where it does not appear upon the face of the incorporating act, or otherwise, that the named corporators applied for it, does not create the corporate body. Something more must be done. There must be at least an acceptance of the grant by a majority of the corporators, before corporate life and existence can begin. *Ang. & Ames Corp.* (11th ed.), § 81; *Morawetz Corp.*, §§ 14, 17; *Boone Corp.*, § 23. Nor is this a case in which acceptance is to be presumed or inferred from the assumption and exercise of the corporate powers, for the proof clearly shows when, where and how this charter was accepted. The testimony is explicit and without contradiction, that the named corporators held their first meeting in the city of Baltimore on the 5th March, 1861, less than a month after the passage of the act, and that on the next day (March 6th, 1861), they accepted the charter at a meeting held by them at the same place. It also appears that at the same time, or shortly thereafter, they elected a president, secretary and treasurer, adopted a seal, determined upon the number and par value of the shares of capital stock, and in fact did everything pertaining to the organization of the company, at meetings held by them at the same place. In short, the proof is direct and positive, that no official meeting either of the corporators, stockholders or directors was ever held in North Carolina until the spring of 1882, nearly two years after this bill had been filed. In view of the fact that all these corporate acts are thus clearly proven to have been done out of the State granting the charter, the question arises as to their validity and the consequent legal existence of this corporation in March, 1869, when the appellant purchased his stock. This question is as directly presented under the averments of the bill and answers in this case, as it ever can be in a civil suit. Legal ownership of the stock which is the foundation of the relief prayed is alleged in the bill, and not admitted by the answers. What then is the law upon this subject?

It seems to be well settled by the weight of authority, that directors may hold meetings, have an office, make contracts and transact a part at least of the general business of the corporation in another State, unless prohibited by local legislation. But the directors

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when so acting are not the corporate body, but its mere agents. *Ang. & Ames Corp.*, § 104; *Balt. & Ohio R. R. Co. v. Glenn*, 28 Md. 287. Nor do we think it makes any difference as to the operation of this rule, that the named corporators, as in this case, are empowered by the charter to manage the affairs of the corporation, and to exercise all such rights as the charter grants, "as directors" until others are elected. The two capacities of corporators and directors are distinct, and they cannot do in the latter those acts which the law requires them to do in the former capacity. We find nothing in this charter which dispenses with the necessity of its acceptance, and of organization under it by them as corporators, and certainly nothing which authorizes them, even if the grant of such authority would in any case be valid, to do these acts in another State. But while the directors may thus act as agents of the corporation, it has, ever since the decision of the Supreme Court in the case of the *Bank of Augusta v. Earle*, 13 Pet. 519, been the recognized rule of American law, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is enacted; that it exists by force of the law, and where that ceases to operate the corporation can have no existence; that it must dwell in the place of its creation and cannot migrate to another sovereignty and that it cannot hold meetings, pass votes, or do any corporate acts strictly so called outside of that sovereignty. *Ang. & Ames. Corp.*, § 104; *Green's Brice's Ultra Vires*, 442, note a; *Boone Corp.*, § 66.

The two cases most generally cited in illustration and application of this rule are *Miller v. Ewer*, 27 Me. 509, and *Freeman v. Machias Water Power and Mill Co.*, 38 Me. 343. The former was a writ of entry to recover a tract of land in the State of Maine, and the demandants claimed title through a mortgage thereof executed by the president and secretary of the Bluehill Granite Company, a corporation chartered by that State in 1836. It appeared in proof that shortly after the date of the charter a meeting of the corporators for organization under it was called and held in the city of New York, that the charter was there accepted, and the officers of the corporation, president, secretary and directors were there chosen; that at a meeting of the directors held in the same city in April, 1837, the president and secretary were authorized by vote to execute the mortgage in question, which they accordingly did, and there was no proof that any meeting for the organization of the

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company, or for the choice of its officers had ever been held in the State of Maine. The court upon this proof held that the mortgage passed no title because the directors who ordered its execution were not lawfully chosen, and by a process of reasoning which seems to us entirely sound, reached the conclusion and laid down the proposition "that all votes and proceedings of persons professing to act in the capacity of corporators when assembled without the bounds of the sovereignty granting the charter are wholly void." The court also in its opinion, delivered by Judge SHEPLEY, reviewed the only two cases, those of *Copp v. Lamb*, 3 Fairf. 314, and *McCall v. Byram Manuf. Co.*, 6 Conn. 428, which had seemingly decided the contrary, and showed that in them the question was either not examined or not presented for decision.

In the other case a party sued the corporation for dividends upon his stock, which he alleged had been illegally forfeited. There also it appeared that the act of incorporation was passed by the legislature of Maine in March, 1836, and in April following an attempted organization was made in the city of Boston, where the number of shares was determined and the certificates issued; and the court following the decision in *Miller v. Ewer*, held that the stock certificate which the plaintiff offered as proof of his right being evidenced by officers chosen in Boston, was invalid, because there can be no stock in a non-existent corporation, and that he could not be a stockholder under any attempted organization outside of the State granting the charter.

As we have said, these cases have been generally approved as expressing the correct rule of law on this subject, and we have found no subsequent case in which, upon the same or a similar state of facts, a different adjudication has been made. In *Keene v. Van Reuth*, 48 Md. 184, no question as to the validity of corporate acts like those in the present case, done or attempted to be done by corporators out of the State granting the charter, arose or was decided. Courts have sometimes differed as to what are corporate acts, and what are acts merely of agents, the majority holding that the directors are merely agents, while some hold their acts as directors to be corporate acts, but the cases are uniform in holding that the charter can be accepted and the corporation organized only within the limits of the State creating it. Nor do we see any good reason why this rule should not be applied and enforced when a proper case for its application arises, in the tribunals of the State

in which the unauthorized acts are done or the suit instituted, as well as by the courts of the incorporating State. The doctrine that a corporation must exist in the place of its creation and cannot migrate to another sovereignty is so reasonable and just, and so firmly imbedded in our jurisprudence that courts ought to have no hesitation in enforcing it. But it would be of little practical utility, if corporators under an act passed by one State can leave it and go to another, and there accept the charter, effect an organization, and thus bring the corporation into existence in a different sovereignty, and there proceed to act under it until restrained by a writ of *quo warranto*. Such acts are mere usurpations of power, mere attempts to exercise authority by persons destitute of it, and should in our judgment be declared inoperative and void, no matter what the consequences may be, whenever they are, as they have been in this case, clearly proved, and a court is asked to grant relief to a suitor whose right thereto is founded upon their assumed or supposed validity. There is no rule of comity which requires one State to be made the birthplace of corporations chartered by another.

We are therefore of opinion that upon the facts appearing in this record, this supposed corporation had no existence at the time the appellant became the holder of what purported to be a certificate of its stock and upon this ground alone we rest the affirmance of the decree dismissing his bill, without considering the other questions which have been argued with much ability by counsel for the appellant.

Decree affirmed.

SEEMULLER V. FUCHS.

(64 Md. 217.)

Auctioneer — personal liability.

Where an auctioneer sells without disclosing the principal's name, and the purchaser is afterward divested by a superior title, he may recover the purchase-money of the auctioneer (See note, p. 768.)

ACTION for money had and received. The opinion states the case. The plaintiff had judgment below.

Seemuller v. Fuchs.

David Stewart and John Stewart, for appellants.

J. Upshur Dennis, for appellee.

ROBINSON, J. One Weeks, being in the possession of a piano under a contract of hiring, sent it to the warerooms of the appellants, who are auctioneers, to be sold. It was sold by them at auction without disclosing the name of the owner, and was bought by the appellee. The piano was subsequently replevied by the owner, and this suit is brought by the purchaser against the auctioneers to recover the money paid on account of the purchase. Now we take the law to be well settled, that one selling property as an agent, without disclosing the name of the principal, binds himself personally. In such cases the purchaser has the right to rely upon the responsibility of an unknown and perhaps irresponsible principal. The same rule applies to sales made by auctioneers. Whether the doctrine of implied warranty of title attaches to a sale made by an auctioneer, for the breach of which he would be liable for unliquidated damages, is a question not necessary to be decided in this case. Be this as it may, it is clear, we think, both on reason and authority, that if a sale is made by an auctioneer without disclosing the name of the owner, and the property is afterward claimed by a superior title, the purchaser may, in an action for money had and received, recover the purchase-money of the auctioneer. There is in such a case an entire failure of consideration, and the sale having been made by the auctioneer, the only person known as vendor, it is but just and right that he should be answerable to the purchaser. There is certainly no hardship in this rule of law, because the auctioneer knows the person on account of whom the goods are sold, and has it in his power to protect himself against loss. Any other rule would not only be a fraud on purchasers, but destructive of all confidence in auction sales.

So far back as *Hanson v. Roberdeau*, Peake's N. P. C. 163, Lord KENYON said, that "though where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is entitled to look to him personally for the completion of the contract."

We have not been able to find a single case in conflict with the

rule thus laid down. On the contrary, it is maintained by all the subsequent decisions, both in England and in this country. *Jones v. Littledale*, 6 Adolph. & Ellis, 486; *Mills v. Hunt*, 20 Wend. 431; *Franklyn v. Lamond*, 4 C. B. 637; 56 Eng. Com. Law. And in all the text-books the principle is laid down in the broadest terms. In his work on Agency, Judge Story says: "Thus where a contract is made with an auctioneer for the purchase of goods at a public sale, and no disclosure is made of the principal on whose behalf the commodity is sold, the auctioneer will be liable to the purchaser to complete the contract, although from the nature of public sales it is plain he acts as agent only. Story on Agency, § 267.

Again, in Addison on Contracts, the author says, "every auctioneer who sells, without at the time of the sale disclosing the name of his principal, contracts personally." p. 642. In Babington on Auctions, 9 Law Lib., § 185, the rule is laid down: "Where an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract."

The cases relied on by the appellants are cases in which the sales were made by administrators or executors or trustees or by sheriffs or other officials, in which the nature and character of the sales, and the objects for which they are made are well known to the purchaser. Besides, one making a sale in an official capacity cannot, for reasons of public policy, be held personally responsible, for otherwise "no one," as Judge ARCHER says in *Mockbee v. Gardner*, 2 H. & G. 176, "could be induced to accept the office. It can hardly be said that an auctioneer is in this sense a public officer. There is a tax, it is true, upon the receipts of sales made by him. and he is appointed, and required to give bond but the tax is laid for the purpose of revenue, and the appointment and requirement to give bond are provisions of the law to secure the prompt payment of the taxes thus levied. His business is essentially a private one; he may sell or not, as he pleases, and is not in any respect under the slightest obligations to the public.

For these reasons the judgment below must be affirmed.

Judgment affirmed.

ALVEY, C. J., and BRYAN, J., dissented.

NOTE BY THE REPORTER.—The doctrine of this case is supported by Batsman on the Law of Auctions, 129. In *Hanson v. Roberdean*, Peake, 120, Lord

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KENYON held that "in such a case, the purchaser is entitled to look to him." the auctioneer, "personally, for the completion of the contract." The same was held in *Franklyn v. Lamond*, 3 C. B. 637. WILDE, C. J., said there: "I apprehend it to be very old law; that an auctioneer who sells without, at the time of the sale, disclosing the name of his principal contracts personally." And so it was held in *Mills v. Hunt*, 20 Wend. 431. And so in *Jones v. Little-dale*, 1 Nev. & Perry, 677.

 WOLFSHEIMER V. RIVINUS.

(64 Md. 230.)

Assignment for creditors — preference — fee for drawing assignment.

An assignment for the benefit of creditors is rendered void by the reservation of a reasonable fee for drawing the instrument.

INSOLVENT proceedings. The opinion states the point.

Fielder C. Slingluff and Randolph Barton, for appellant.

Henry D. Loney and William J. O'Brien, for appellees.

IRVING, J. The sole question in this case is, whether the reservation of a reasonable fee for the draughtsman of the deed, for its preparation, is such a preference in a deed for the benefit of creditors, as is forbidden by the Insolvent Act of 1884, ch. 295. The language of that act is very general and covers every species of debt, and we see no escape from holding that the reservation made in this deed is within the prohibition of that act. The debtor, who was in failing circumstances, employed the draughtsman. No one else could, for there was no trustee to do it until the deed was done. It was his debt or he could not charge his estate in the hands of a trustee, with its payment as he did do by the deed. He ought to have paid the draughtsman and left no debt outstanding for the service rendered, to be paid in full from his estate as a preference debt. The question turns entirely on the construction of the act of assembly, and in determining what kind of debt is contemplated by and embraced in it, we find no occasion to cite authority in support of our view. If this deed had never been executed, there can be no question that the draughtsman would have had a proper claim against the employer, notwithstanding the deed had never

been executed. Its execution could not change the character of the claim unless there had been a special contract to that effect. The fee for preparing this deed was beyond question a debt of the grantor, and though created in an attempt to provide for his creditors, we find no warrant for excepting it from the operation of the act. A majority of the court thinking the order of the Insolvent Court of Baltimore city appealed from was properly passed, the same will be affirmed.

Order affirmed.

BRYAN and RITCHIE, JJ., dissented.

DIAS V. CHICKERING.

(64 Md. 348.)

Agency — to sell — agent selling as his own.

The plaintiff consigned a piano to B. and E., a firm, to be sold for cash. With the assent of E., B. removed it to his house and used it there for nine or ten months, when he sold it, as belonging to himself or his wife, to the defendant, who paid him a fair price, and purchased in good faith. *Held*, that the plaintiff could not recover the piano.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Isidor Raynor, for appellant.

B. Howard Haman, for appellees.

RITCHIE, J. The uncontroverted testimony in this case shows that Buckland & Ebeling were a firm engaged in selling pianos of their own, and also on consignment from other parties, among whom were the appellees; that the piano replevied in this case was one they had received from the appellees, and that they were authorized to sell it for cash, and when sold their duty was to transmit the proceeds to the appellees; that this piano was, with the assent of Ebeling, removed to the residence of Buckland for private use, and after remaining there for nine or ten months was sold by Buckland, as belonging either to himself or wife, to the appellant, whose business was that of a dealer in furniture, for two hundred

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and fifty dollars, a fair price at the time; that appellant paid the money to Buckland, taking his personal receipt, and was a *bona fide* purchaser, without notice of the relations between the firm of Buckland and Ebeling and the appellee, and unaware that either Buckland or the firm was in any financial trouble; a fact which he learned through the newspapers several days after the purchase.

The controverted evidence was on the point whether Buckland, when the piano was removed to his home, nine or ten months before the sale, had bought it, or merely borrowed it; Buckland testifying that he had bought it, directing it to be charged to his account, and Ebeling that it was merely lent to him.

In our view of the effect of the undisputed evidence, it is immaterial in this case whether Buckland had bought the piano from the firm, or only borrowed it. The question is not whether Buckland had actually acquired title to the piano in himself as between him and the Chickering, but whether under all the facts and circumstances disclosed in the undisputed proof, Dias is to be protected, as an innocent purchaser for value, against the principals of Buckland and Ebeling. In our opinion he is clearly so entitled.

Assuming that Buckland had not purchased the piano himself in fact, or that having undertaken to buy it, his character as agent rendered such a purchase voidable in law; he was nevertheless as one of the firm of Buckland and Ebeling put in possession of the piano and specifically clothed with the power to sell it for cash to any outside party. Such a sale he actually did make; he sold the piano for cash and received the money; and assuming the ownership of the property not to be in him, he should have transmitted the proceeds to the Chickering to whom it was due, and who are legally entitled to recover it from him. But so far as the purchaser is concerned, his obligation ended with his payment. The private instructions from the principal to their agent, he is not a party to nor bound by. Buckland being clothed, not only with possession of the piano but the right to sell it also, and moreover having been allowed to treat it as his own property, and so use it in his private family, without objection or interference by the Chickering for nine or ten months, we think, under the common law, without pausing to consider the Factor's Act, the Chickering are now estopped from making any demand upon Dias, and that the latter took a good title to the piano.

The facts in this case bring it within the principle, that "when

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one of two innocent parties must suffer by the fraud of a third, the loss shall fall upon him who has enabled such third person to do the wrong." It also comes within the general rules as laid down in Wharton on Agency, § 200: "At common law, an agent with *prima facie* right to sell may convey title to a *bona fide* purchaser without notice;" and in section 201: "Where property is unlawfully sold by an agent, it or its proceeds, may be followed by the principal until he meet with a *bona fide* purchaser without notice."

The case of *Hall v. Hinks*, 21 Md. 406, in which there is a full discussion of the principles involved, fully covers the one before us. The doctrine there expressed, as applicable to a case like this, is also recognized in *Levi v. Booth*, 58 Md. 311, 312; s. c., 43 Am. Rep. 332.

It follows therefore from our conclusions, that we regard the rulings and instructions of the court below as erroneous; and as the evidence below would have justified an instruction to the jury to find a verdict for the defendant, we shall reverse the judgment without awarding a new trial.

Judgment reversed.

ALVEY, C. J., dissented.

HUSSEY V. RYAN.

(84 Md. 423.)

Landlord and tenant — nuisance erected by tenant — injury after surrender — contributory negligence.

A tenant who during his term erected an insecure fence on the leased premises may be liable for an injury by its falling on a passer in the street after his surrender of the premises to the landlord.

The person injured was a child thirteen years old. *Held*, that she was not negligent in stopping in front of the fence to look at something across the street, although she would not have been hurt if she had not stopped. *

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Arthur W. Machen, for appellant.

John I. Yellott, for appellee.

* See *Murray v. McShane* (52 Md. 217), 86 Am. Rep. 867; *Varney v. Manchester* (58 N. H. 480), 42 Am. Rep. 492.

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RITCHIE, J. The plaintiff's cause of action on which he recovered below is thus set out in his amended *narr.*:

“For that he, the defendant, heretofore, to-wit, on the first day of February, 1884, at the city of Baltimore, was, and for a long time prior thereto, had been in possession of certain premises there situate, and while so in possession wrongfully and unjustly caused to be put and erected in and upon a certain public street and highway there called West Pratt street, a high and long fence, to-wit, about twelve feet high and fifteen feet long, and connected therewith a certain wooden shed or structure; and wrongfully, negligently and unjustly allowed and permitted said fence belonging and appurtenant to the premises aforesaid, so in possession of the defendant, and in and upon the said public street and highway, to-wit, West Pratt street, to become dilapidated, unsafe and dangerous to persons rightfully passing on and along said public highway or street, and to remain in such dilapidated, unsafe and dangerous condition for a long space, to-wit, from the said first day of February until the day of the institution of this suit; by means and in consequence of which said wrongful, negligent, unjust and improper conduct of the said defendant, the fence did on the 20th day of February, 1884, fall down upon, over and across the said public street or highway, to-wit West Pratt street; and Maggie Ryan, the infant daughter of the plaintiff then passing on and along said West Pratt street, on the way to the place of her employment, while in the exercise of reasonable caution and care on her part, was unavoidably crushed beneath the weight of the said falling fence and nuisance, and thereby cut, bruised, wounded and permanently injured whereby she became sick, sore and disordered, and has so remained until the institution of this suit; whereby the plaintiff during all that time was deprived of the services and assistance of his said infant daughter, and was forced to lay out and expend a large sum of money in and about her care and nursing, to-wit, the sum of one hundred dollars, and has during all that time been deprived of her services and assistance, and other wrongs and injuries were inflicted upon the plaintiff by the wrongful, unjust and negligent acts of the defendant hereinbefore alleged.”

“And the plaintiff brings this suit therefor, and claims \$1,000 damages.”

The proof clearly established the falling of the fence upon the child while near it on the street designated, on the 20th of Feb-

ruary, 1884; that the fence was of the dimensions described, and appurtenant to the lot whose front it bounded, as it ran along and with said highway; that the defendant had occupied said lot as tenant, a vacant one when he went upon it, and had used it for the purposes of his business, and had erected the fence or part of it, and the shed or stable which stood against it, at least six or eight years prior to the time of the accident; that he had surrendered possession of the lot to his landlord on the fourth of said month of February, and removed the stable about the same date; and also after the accident removed the fence still standing, and took it into his own possession.

[Omitting other points.]

The defendant's second prayer presents the proposition, that if the surrender of the lot to his landlord took place on the fourth of February, and the accident did not occur until the twentieth of the same month, he was not liable. This prayer, we think, was also properly rejected.

We see nothing in a simple surrender of the lot, in connection with the other facts in the case, to relieve the defendant from the operation of the general principle, that the originator of a nuisance is liable for injuries occasioned thereby. There are cases in which it has been decided that by reason of the nature of the conveyance of the property on which a nuisance exists, an adoption of the nuisance, and an obligation to make repairs have been assumed by the grantee, to the relief of the originator; but the facts of this case bring it within no such exception. No particulars of the terms of the lease between the defendant and his landlord are furnished. And the surrender of the landlord appears to have been a mere relinquishment of the lot; the defendant acting as the owner of the fence and structures erected by him, and exercising, even after the day of the accident, the right to enter upon the premises and remove the fence as his own, part of which had caused the injury complained of. As the lot was a vacant one when he leased it, the presumption is that he had the ownership of and the right to enter and to take away all structures erected by him during his tenancy, as he in fact did. Wood Nuis., §§ 114, 676.

In defendant's fourth prayer he submits the instruction that if the child "stopped on the street while passing the fence for the purpose of looking at some object on the opposite side of the street, and that the accident would not have occurred if she had not

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stopped," the plaintiff could not recover. The mere stopping of the child had no effect upon the condition of the fence, and as broadly stated, it was asking the court to rule as matter of law, that it is contributory negligence to stop on a highway, and without reference to the length of time of the stop, if injury from a dilapidated structure then happens. The presumption to a traveller of a street is not that adjacent buildings are unsafe and liable to fall, and that reasonable care requires him to hurry on; he naturally supposes otherwise, and such a supposition is in accord with the public duty of proprietors of structures along such a highway to prevent their becoming unsafe to passers-by. There are many instances in which it is not incompatible with the lawful use of a street to halt while passing along. The conduct of the child in this case is one. She paused only for a minute or two, to gaze with childish curiosity at some workmen shingling a roof. There was certainly no error in rejecting this prayer.

Judgment affirmed.

LINTHICUM V. COAN.

(64 Md. 430)

Water and water-courses — allusion.

SUFFICIENTLY reported, 53 Am. Rep. 219.

LINEWEAVER V. SLAGLE.

(64 Md. 465.)

Partnership — limited — payment of capital — actual cash.

On the formation of a limited partnership the special partner gave his certified check for \$10,000, the amount of his capital, which was deposited to the credit of the new firm. Afterward, on the same day, the firm gave him their checks on the same bank for some \$7,600, the amount appearing to his credit on the books of a former firm composed of the some members. *Held*, that this was not an actual cash contribution as required by the statute, and the special partner was liable as a general partner. (*See note, p. 781.*)

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ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

George Whitelock and Samuel Schmucker, for appellant.

Fred. W. Story and Edward Otis Hinkley, for appellee.

MILLER, J. Several questions arise on this appeal, and present, for the first time in this court, the construction of certain sections of article 72 of the Code, relating to "limited partnerships."

This suit was brought by the appellant against Luther W. Hopkins, Charles T. Matthews and David W. Slagle, as partners doing business under the firm name of "Hopkins, Matthews & Co." This firm failed and made an assignment for the benefit of its creditors on the 29th of April, 1884. The cause of action sued on was a promissory note for \$404, signed in the firm name, dated the 1st of April, 1884, and payable at thirty days to the order of "Line-weaver & Co.," of which latter firm the plaintiff was the surviving partner. There was no controversy as to the liability of Hopkins and Matthews, but Slagle set up the defense that he was a special partner, and the effort of the plaintiff was to hold him responsible as a general partner. At the trial several exceptions were taken by the plaintiff to the rulings of the court which present the real subjects of dispute, and these have been argued by counsel with much zeal and ability.

The testimony shows that on the 15th of March, 1880, these three parties, Hopkins, Matthews and Slagle, formed a partnership under the firm name of "Hopkins, Matthews & Co., to carry on a general commission business in the city of Baltimore, in which Slagle became a special partner and contributed \$5,000 capital. This partnership, by its terms, commenced on the 15th of March, 1880, and ended on the 14th of March, 1882, and in regard to its due formation no question arises. It is conceded that all the requisites and formalities required and prescribed by article 72 of the Code were duly followed and complied with. In this firm Slagle was unquestionably a special partner merely, and not therefore liable for its debts beyond the \$5,000 which he had contributed to its capital. On the 15th of March, 1882, the day succeeding that limited for the duration of this partnership, the same parties executed and acknowledged the following certificate :

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“ Be it remembered, and it is hereby certified that we, Luther W. Hopkins and Charles T. Matthews, as general partners, and David W. Slagle, as special partner, and all residing in the city of Baltimore, in the State of Maryland, have formed and entered into a limited partnership under the name or firm of ‘ Hopkins, Matthews & Co.,’ and intend to transact a general commission business in the city of Baltimore. The said W. Slagle has contributed \$10,000 to the capital of the firm, and the partnership is to commence on the 15th day of March, 1882, and is to terminate on the 28th day of February, 1885.”

This certificate was duly recorded, and the “ terms of the partnership ” duly published in the newspapers; and it has been contended by counsel for the appellee that this partnership is to be regarded as a “ renewal or continuance ” of the one which it succeeded.

[Omitting this.]

The next question is, did Slagle contribute and pay the \$10,000 as the law requires, so as to entitle him to the status, and immunity of a special partner? In various sections of this article, it is provided that the special partner “ shall contribute in actual cash payments a specified sum as capital to the common stock; ” that a certificate shall be executed, acknowledged and recorded, which shall state, among other things, “ the amount of capital which each special partner shall have contributed to the common stock; ” that at the time of filing this certificate, there shall also be filed an affidavit of one or more of the general partners, “ stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash; ” that “ if any false statement shall be made in such certificate or affidavit, all the persons interested in such partnership, shall be liable for all the engagements thereof as general partners, ” and that “ the partners shall publish the terms of the partnership when registered, for at least six weeks immediately after such registry, in two newspapers to be designated by the clerk of the court in which such registry shall be made.”

These are some of the conditions which the legislature has seen fit to attach to the privilege of participating in the profits of a partnership, without absolute liability for its debts. One of the objects they are intended to attain, is notice to the public of the exact terms of the partnership, so that those who deal with it may do so advisedly. Another, and the most important, is that the contribution

by the special partner shall be made in actual cash. This also has in view the protection of the public. "Its object is to provide a fund on the day the company is formed, to be thereafter subject to no contingencies or losses, except those which come from the proper business of the partnership" (103 Mass. 19), and wherever the question has arisen, the courts have uniformly exacted a strict compliance with this condition. The contribution cannot be made partly in cash, and partly in goods, credits or assets of another firm taken at a valuation, nor will government bonds or any other class of commercial securities, no matter how valuable they may be, or how easily convertible into money, be accepted as a substitute for the "actual cash payments," which the statute requires. *Haviland v. Chace*, 39 Barb. 283; *Pierce v. Bryant*, 5 Allen, 91; *Haggerty v. Foster*, 103 Mass. 17; *Richardson v. Hogg*, 38 Penn. St. 153; *In re Merrill*, 12 Blatchf. 221; *Van Ingen v. Whitman*, 62 N. Y. 513. Nor is it material that the parties may have acted in good faith, and have honestly intended to comply with the law, and have honestly supposed the transaction did gratify the statute, for as was said by FOLGER, J., in the case last cited: "The statement of the amount of the cash payment is required so that the public may gauge thereby the extent of its dealings with the firm. The affidavit is called for, that the public may have reliance upon the existence of the fact of payment. The statute is thwarted, the public is misled and deceived, as much when there is an unintentional untruth, as when there is an intentional one. This statute does not set out to deal with motives, but with acts and their results; and it guards the public, not by requiring good intentions, but a certain act done in a certain mode, and a true statement that it has been thus done." To the same effect is the decision in the Massachusetts case (103 Mass. 17) where it was held that government bonds could not be regarded as equivalent to cash within the meaning of the statute. "It is wholly immaterial," says the court, "that the transaction at the time was honestly intended and understood by the parties to be sufficient; that the securities actually transferred afforded the means by which their cash value was in fact subsequently realized; or that creditors were not actually defrauded. The statute is plain and explicit. The use of the phrase, 'actual cash payment,' is emphatic and significant. It is wisely intended to exclude a construction by which commercial securities of any description may be regarded, by the aid of mercantile usage, as substantially equivalent

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to cash; and to remove from all parties the temptation to evade its requirements in this respect."

This brings us to an examination of the facts attending the alleged contribution and payment of the \$10,000. The proof shows that on the 15th of March, 1882, the day on which the certificate was signed, and at about 10 o'clock, A. M., Slagle gave to the firm of "Hopkins, Matthews & Co." a certified check on the Citizens' National Bank, for \$10,000, which was soon afterward deposited by the firm and passed to its credit; that in a few hours, and on the same day, between two and three o'clock, P. M., the firm gave Slagle its check on the same bank for \$6,500 and that three days afterward the firm, by another check, paid him the sum of \$1,119.16. There is further proof to show that the old firm kept their account in the same bank, and that on the 15th of March, 1882, and prior to the deposit of Slagle's check, that account was overdrawn to a small amount, and that on that day and the next, neither the old firm nor the new one, nor Hopkins and Matthews, the general partners in both, had any money in bank out of which the \$6,500 check could be paid, save that which was derived from Slagle's check for \$10,000. Assuming then that these were the facts, or that a jury would so find from the evidence, the transaction amounted simply to this, that Slagle on the morning of the 15th of March, 1882, paid in his \$10,000, and a few hours afterward on the same day \$6,500 of the same money was paid back to him. Now we take it to be too plain for argument that this was not such a "contribution" of \$10,000, "to the common stock" of the firm that day formed, as the law requires. In no legitimate sense of the word can the paying of money one hour and receiving it back the next, be said to be a "contribution" of it for any purpose whatever. We hold it to be clear that to gratify the statute the special partner must pay his money into the common stock and leave it there to the risks of the business. The payment and devotion of the money to the business of the firm must be actual and absolute, not apparent and illusory. If the terms referred to leave any doubt that this is what the statute means, that doubt must be removed by the thirteenth and fourteenth sections, in which it is expressly declared that "no part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits or otherwise during the continuance of the partnership," and if by payment of interest or

profits, his capital shall be reduced, he "shall be bound to restore the amount necessary to make good his share of capital, with interest."

But the appellee has explained why these sums of \$6,500, and \$1,119.16 were thus paid back to him immediately upon the formation of the new partnership. That explanation, as we gather it from the record, is substantially as follows: There is proof to show that at the termination of the old firm, its books were balanced, and taking the accounts at their face value there stood to the credit of Slagle as special partner in that firm \$5,000 capital, and \$2,619.16 profits, aggregating \$7,619.16, the precise amount paid to him by the two checks of the 15th and 18th of March, 1882; that in the partnership articles of the old firm there was one to the effect that on its expiration, the general partners should purchase all the fixtures, tools and implements used in the prosecution of its business, then on hand; that the assets of the old were taken by the new firm at an estimated value which was guaranteed by the old firm; that all the debts and liabilities of the old firm were paid as its assets were collected, and a balance was left of such assets sufficient to pay back to Slagle all his capital and profits except the sum of \$609.52; and that this deficiency was charged against him in the accounts of the new firm. There is also proof that at the time the books of the old firm were thus balanced, the cash thereby appearing to be on hand was theoretical merely, and that the actual cash was scattered all over the country in the shape, as we infer, of debts and accounts due the firm; that these were not collected until some time after, precisely how long is not stated, the new firm had been in operation; and that all of them never were collected, for when the affairs of the old firm were liquidated there was a deficiency in the estimated value of these assets to the extent of \$1,828.56. Now assuming as true all the facts above stated that can be regarded as favorable to the appellee, we do not think his case is placed in any better legal position. The fact still remains that the \$10,000 was not contributed in cash as the law requires. The sum of \$2,380.84 only was so contributed, while the balance, amounting to \$7,619.16, was, in fact, represented by his interest in the uncollected and unrealized assets of the old firm, taken at a valuation which was guaranteed by that firm. In our judgment this cannot be accepted as an equivalent for the cash which the law requires, without ignoring all the decisions upon the subject, as well as the plain meaning of the statute

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itself. In our opinion the requirement that the special partner shall "contribute" a specific sum "in actual cash," was made by the legislature for the very purpose of preventing such transactions. The statement therefore in the certificate and affidavit, that Slagle had made this contribution of \$10,000, was in legal contemplation "a false statement" no matter with what good faith or with what honest intentions he and his associates may have acted.

[Omitting other questions.]

Judgment reversed and new trial awarded.

Reversed and remanded.

NOTE BY THE REPORTER.— It seems however that if the check is not certified it is not "actual cash" in any event. The delivery before the filing of a certificate of special partnership, by a party intending to become a special partner to the general partners, of a check payable to their order, drawn on a bank, where he has funds to meet it, is not "an actual cash payment" within the meaning of the New Jersey statute, and will not entitle him to protection as a special partner. In *Durant v. Abendroth*, 69 N. Y. 148; s. c., 25 Am. Rep. 158; *Van Ingen v. Whitman*, 62 N. Y. 518, it is urged however that the delivery of a check payable at sight is equivalent to an appropriation of a cash fund to the capital of the partnership and is therefore a substantial compliance with the statute. If instead of handing over the money the special partner should deposit the amount of his contribution in a bank to the credit of the firm, or with a third person, so as to part with all control over it by himself exclusively, and enable the general partners to appropriate it, it might well be urged that this would be a sufficient compliance with the statute. A sum may be deemed to be paid or contributed in cash when the money is placed within the absolute control of the person who is to receive it, although not within his manual custody. But where a check is drawn for the benefit of the payee upon a bank in which the drawer has a deposit, and is delivered to the payee, the latter does not acquire even an equitable lien upon the fund in bank. The relations between a banker and depositor to whose credit money is placed, is the ordinary relation of debtor and creditor, and has been universally so regarded since the question was elaborately discussed and decided in the House of Lords in the case of *Foley v. Hill*, 2 H. L. Cas. 28. It is equally well settled that an assignment of a part of a debt will not bind the creditor either in equity or at law, nor deprive him of the right to pay the whole to the assignor after notice that part has been transferred to the assignee (*Mandeville v. Welch*, 5 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15; *Hopkins v. Beebe*, 26 Penn. St. 85; *Gibson v. Finley*, 4 Md. Ch. 75), and because the right of the depositor against a bank is merely that of a creditor, and an assignment of part of the deposit is not an equitable assignment of any interest in the fund, a bill of exchange or check, before acceptance, does not operate as a transfer of the funds of the drawer in the hands of the drawee, nor create any lien thereon. *Chapman v. White*, 6 N. Y. 412. The holder of a bank check cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer. *Bank of the*

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Republic v. Millard, 10 Wall. 152; *First Nat. Bank v. Whitman*, 94 U. S. 343. A check is but an order on a depository, directing him to pay a certain sum to the payee or bearer. The drawer can intercept its payment at any time before actual payment or acceptance by the drawee. It does not furnish to the payee a fund which is subject to his exclusive control. It may be regarded by mercantile usage as equivalent to a cash payment; it may be convertible immediately into money; but its delivery to the general partners is not the payment in actual cash which is contemplated by the statute. U. S. Cir. Ct., S. D. N. Y., March 26, 1886. *McGinnis v. Farrelly*. To the same effect, *Durant v. Abendroth*, 69 N. Y. 148; s. c., 25 Am. Rep. 158.

In *Hogg v. Orgill*, 84 Penn. St. 844, it was held that payment in good checks of third persons, the money actually going into the business, was valid, and in *Seibert v. Bakewell*, 87 Penn. St. 506, it was held that the special partner's check drawn against an actual deposit, the bank having no claim against the drawer, was valid.

**GENERAL GERMAN AGED PEOPLE'S HOME OF BALTIMORE CITY
V. HAMMERBACKER.**

(64 Md. 595.)

Corporation — charitable — conditions of admission — remedy for fraud upon.

The plaintiff was a charitable incorporated asylum for aged persons, one of the conditions of admission to which was that in addition to a certain entrance fee, the applicant should transfer all his property to the asylum. Z., knowing the conditions, paid his entrance fee and declared in writing that he had no other property, and was received without executing any transfer. He remained until his death, when it was discovered that at the time of his entrance he had \$1,200. *Held*, that the plaintiff could recover it from his administrator.

THE opinion states the case. The defendant had judgment below on demurrer.

Jacob J. H. Mitnick and *Louis P. Henninghausen*, for appellant.

Samuel J. Hannan, for appellees.

STONE, J. The object of the incorporation of "The General German Aged People's Home of Baltimore City" was certainly a commendable one. Its aim was to furnish to aged and indigent Germans a home for the residue of their lives. It was intended for those only who were over sixty years of age, who were unable to

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work, and possessed of a good character, and without the means to secure for themselves a comfortable home. But with all these requisites before an applicant could be admitted, an admission fee, ranging from \$300, the highest, to \$150, the lowest, must be paid. This admission fee might be paid by the applicant himself, if he possessed sufficient means, or by his friends or relatives, if he was unable to do so. Another requisite for admission into the institution was, that the applicant should transfer to the institution all the property that he had at the time. It is this latter provision that creates the difficulty in this case, and which will require examination.

It is the primary purpose of this corporation to furnish homes for those who are unable to support themselves in any degree of comfort, and not for those who are so able. It is not its object to furnish for the small admittance fee of \$300 or \$150 a home for life to those who still hold property, to do as they please with. To allow that would be to convert the institution into a very cheap boarding-house, where, in addition to comfortable board and lodging for life, the inmate would be entitled to medical attendance if sick, and a decent burial at his death, and all this for \$300 at most. But there is and must be a large class of persons who own and possess more property than enough to pay the admission fee, but not enough to support themselves in the comforts they would find at the home. It was for this class that the provision in the constitution (art. 5, sec. 2, paragraph c) required the inmate to transfer to the corporation all the property he might have, and it is this provision that is supposed to be *ultra vires*. But in our opinion it is not.

The certificate of incorporation provides, "that the corporation so formed, is a corporation for the purpose to establish and maintain in the city of Baltimore, or within its vicinity, an institution under the name of 'The General German Aged People's Home,' wherein aged people of both sexes, of good moral character, under such conditions and rules as may be prescribed by the constitution and by-laws of this corporation, may find an asylum."

Among the rules laid down in the constitution is the one heretofore referred to, that one of the conditions of the admission was the transfer to the institution of all the property of the applicant.

The general corporation law of the State provides that every corporation incorporated under the general law shall possess cer-

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tain powers, and among these enumerated powers is the right to acquire by purchase, or in any other manner not inconsistent with law, any property which is necessary or proper to enable such corporation to fulfill the purposes named in its certificate of organization. (See sec. 48 of Corporation Law.)

Under this general law, the corporation would be entitled to receive property, unless it was inconsistent with law, or unless the constitution and by-laws of this corporation forbade the acquisition of property in that mode. But the constitution provides that the revenues of the corporation should be derived from the yearly dues of members, admission fees, donations, presents, legacies and gifts. Now under this clause, to say nothing of the general law, a person, not an inmate or applicant, could certainly donate or give property or money to the institution. If A., not an inmate, presented the corporation with \$1,000, no one would doubt its power to receive it, under the head of a voluntary donation or gift. It certainly would be a hair-splitting rule to say that if B., who was an inmate, or an applicant, did the same, it would not be a donation or gift. It is not a purchase, for the inmate gets his right to be there, from his age, his good moral character, and the payment of his admission fee. He may not have a cent of money or property to convey, but if the other conditions are complied with, he is admitted. It is as properly classed as a voluntary donation, in the one case, as the other.

But it is argued that such conveyance of property is against public policy. But public policy does not forbid the purchase of an annuity. By the payment of a sum in gross, the annuitant obtains a certain sum of money annually as long as he lives. This is much practiced in England, and somewhat in this country, and has never been held to be against public policy. There is no difference in principle between receiving a sum of money annually for life, and a home, including board and clothing, for life. If an applicant has money or property, the income of which is not sufficient to support him or her, in as much comfort as they can get at this home, it is certainly not against public policy for them to dedicate it to securing to themselves the advantages of this institution. Indeed, where the applicant has no one depending upon him, it is commendable in him to do so.

Nor is it against public policy for an organized charity like this to receive such donations, it being, as we have shown, within its corporate powers. On the contrary, this and similar charities are

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directly within the line of a sound and humane public policy. They not only tend to relieve suffering in the individual, but tend to keep them from being a charge upon the general public. For this purpose money is necessary, and they are allowed to receive and appropriate it as their charter allows.

But if we were in error about this, under the decision of this court, in the case of *United German Bank v. Katz*, 57 Md. 128, the defendants would be estopped from setting up such defense. In that case the defendant set up as a defense to the note sued on, and which had been discounted by the bank, the want of power in the bank so to do. But while the court said that the bank had no such power, the defendant, having received the money, such defense was not available to him. That where the contract has been executed, by the plainest rule of good faith it should be permitted to stand. That although a corporation may act in disagreement with its charter, yet a party who has had the benefit of the agreement cannot be permitted to question its validity.

We shall see hereafter that this agreement was fully executed by the complainant, and therefore neither Zolles, nor those claiming under him, can now set up such defense.

But our opinion as to the power of this corporation to require the applicant to convey to it all his property, must be confined to property owned and possessed by the applicant at the time.

As to its power, by bond or otherwise, to enforce the conveyance to it of any future acquisition of property it is not necessary for us to express any opinion, as that question does not arise in this case; the whole property now in dispute being owned by Zolles at the time of his application for admission. We may say that some different principles might govern the case of future acquisitions.

The facts in this case are few and plain. One Zolles applied for admission into this Home. He acknowledged that he knew the rules of the institution relative to his admission, and assented to the same. He declared in writing that he had no property, except the sum of \$300, his admission fee, and that he was willing to transfer all his property to the institution; and being found otherwise qualified he was admitted. He died in the institution in about a year and a half afterward. After his death, the institution discovered that he had given them a false account of his property, and that he had some twelve hundred dollars in money and notes, which his administrators now claim, and threaten to sue for.

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That Zolles practiced a fraud upon the institution is manifest from this statement. He did know the rules, and he made the most solemn declaration in writing that he had no other property beyond the \$300. Had the appellants known of the money he had, they would not have admitted him to the Home until he had conveyed it to them by proper legal conveyance. But believing his statement, which was vouched for by two others beside himself, they did not deem it necessary to take a conveyance of property, when they believed there was none to convey.

The question then is, shall the representatives of Zolles now derive a benefit from his fraud? The appellants have performed the whole of their agreement with Zolles. They gave him a comfortable home for his life, proper attendance when sick, and a decent burial after his death.

That equity will consider that as done which ought to have been done, is too well settled to need a reference to authorities. The recent case of the *Equitable Gas Light Co. of Baltimore v. Baltimore Coal Tar Manfg. Co.*, 63 Md. 285, was a case where there was a fraudulent refusal to execute a written contract, and the court said:

“This agreement was of a distinctive character, and was looked to by both the contracting parties at the time as essential to the security of their rights. To allow either of the parties to evade its liability and get the advantage of the other by resorting to such a fraudulent subterfuge as that charged upon the defendant, would be against all equity and conscience, and such as no well-adjusted system of jurisprudence could tolerate. The authorities, we think, fully warrant a court of equity in the exercise of its jurisdiction in such case to enforce the production of the contract fraudulently withheld, to the injury of the plaintiff, or to enforce the due and proper execution of the contract, if such execution be fraudulently and without justifiable excuse delayed, to the injury of the plaintiff;” and in support of that position several authorities are referred to.

That a court of equity will decree the specific performance of a contract where the execution was prevented by fraud is very clearly laid down in that case. While courts of equity do not specifically enforce contracts in respect to personal property, with the same facility as contracts relating to real estate, because in the former case the courts of law are generally competent to afford relief, yet,

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whenever the party cannot have at law a full and satisfactory remedy, a court of equity will grant relief. 2 Story Eq., § 717; *Alexander v. Gheselin*, 5 Gill, 138; *Sullivan v. Tuck*, 1 Md. Ch. Dec. 59; *Triebert v. Burgess*, 11 Md. 452.

In this case it is clear that the complainants can have no full and adequate remedy at law. The complainants, by reason of the fraud practiced by Zolles, have not a *legal* title to the property, such as would enable them to maintain an action at law. Their title is an equitable one, and relief therefore can only be obtained through a court of equity. If this property was delivered over to the administrators, and the complainants forced to file a bill against them, it would only be a needless circuitry of action and an unnecessary expense.

We are of opinion upon the whole case as made by the bill that if the allegations are sustained by the proof (this case being upon demurrer), or admitted by the defendants, the complainants are entitled to relief, and decree sustaining the demurrer and dismissing the bill should be reversed, and the case remanded for further proceedings in conformity to this opinion.

Decree reversed and case remanded.

MILLER, J., dissented.

CASES
IN THE
SUPREME COURT
OF
OHIO.

PAGE V. THOMAS.

(43 Ohio St. 33.)

Partnership — real estate — held in individual names — liability for partnership debts — rights of creditors.

Real estate purchased with partnership funds and used by the firm in its business is partnership property, though the legal title is in the names of individual partners; and it is liable to the payment of partnership liabilities in preference to a judgment of a separate creditor, although such partnership liabilities accrued subsequent to the time that the judgment lien attached. (See note, p. 792.)

ACTION to subject land to a judgment. The opinion states the case.

E. L. & H. C. Taylor, for defendant in error.

J. C. Richards and *J. T. Holmes*, for defendants in error.

JOHNSON, J. The judgments below are to the effect that the partnership liability to Thomas must first be paid, although Page had acquired a statutory lien, by judgment on individual claims.

The conceded facts of the case are: *First*, that the statutory lien of Page's first judgment attached to the lot in controversy as early

as January, 1871, and of the second judgment as early as April 15, 1875. At those times, and until June 10, 1875, the legal title to said lot was in Benjamin E. Smith and John F. Bartlit. *Second*, that the said lot was purchased with the funds of the partnership, for partnership purposes and was actually used in and for the benefit of the partnership business of said firm of Bartlit & Smith. *Third*, that the two judgments of Page were not partnership liabilities of said firm, but that the judgment of Thomas was such a firm liability.

For the purposes of this decision, we will assume, without deciding that the note taken by Thomas, December 22, 1875, for \$10,000, in lieu of certificates of the firm for like amount, was the commencement of the firm liability to Thomas.

We then have a case wherein the statutory liens antedate the partnership liability to Thomas, and the question is, which has priority?

At the time these statutory liens attached, the partnership was a going concern, and so continued until March 16, 1876, when it terminated with the death of John F. Bartlit, at which time it was insolvent, the assets being insufficient to pay the partnership liabilities.

The legal title to this lot at the time Page's statutory liens attached was, in equity, held in trust for the benefit of the partnership. It was afterward conveyed to Henry Miller by deed, absolute upon its face, but his claim, whatever it was, had been satisfied and he, it is conceded, is a mere holder of the legal title.

He therefore holds it under a like trust.

Counsel for Page conceded that if Thomas' claim antedated his liens, the former would be entitled to priority, but they claim that a subsequent partnership liability during the continuance of the firm cannot have such priority.

Though there are other questions in the case on which we think the court below did not err, we have reserved this single question for report.

Upon the general question of the equities of partnership and individual creditors nothing need to be said, as the rule is too well settled to admit of discussion; that in case of the insolvency of the partnership, its assets must first be applied to the satisfaction of partnership liabilities, and while the individual interest of each partner is liable to seizure upon execution by his separate creditors,

yet that each partner holds his interest in the joint property subject to a trust, for the partnership creditors and the claims of his several copartners, so that the beneficial interest of each is his residuary share after the partnership accounts are all settled and the rights of parties *inter sese* adjusted. The levy or lien acquired by the separate creditor only holds this beneficial interest. The statutory liens of Page acquired in 1871 and 1875 reached this beneficial interest only, subject to the trust stated. Had Page at those dates commenced actions to ascertain that interest and to have it subjected to the payment of his judgments, the residuum, after winding up the partnership, if he then had the right to wind it up, would have been the share of Bartlit & Smith in said lot, after all partnership claims were settled.

He did not do this, but permitted the partnership to continue, subject to all the hazards of the business and to all the prospects of gain by reason of its continuance. Until the mutual relations of the partners, and the trust incident thereto, are lawfully terminated, the property is subject to the rights of partners and their creditors, to have the same devoted to its uses. In the case at bar, this relation was terminated by the death of Bartlit in 1876.

In the meantime the partnership liability to Thomas was incurred; Page's lien therefore was a lien upon the legal title of property held in trust for other purposes than to pay the individual debts of the joint owners. Whether those debts had their origin before the date of his liens, or afterward, while the property was being used and held to carry out the object of the trust, is immaterial, as the beneficial interests of the separate partners is only that which remains at the termination of the trust and after all partnership liabilities are adjusted. The trust being of a continuing nature, this beneficial interest cannot be determined until the trust is determined. Neither partner has any distinct interest that he can call his individually, until that beneficial interest is ascertained, and a separate creditor, by statutory lien or by seizure, can acquire no greater interest than the partner has.

We hold therefore that the lien of the Page judgments is subordinate to the equity of Thomas to subject the partnership assets to the payment of his partnership claim, although it may have accrued since said liens attached.

In *Norwalk National Bank v. Sawyer*, 38 Ohio St. 339, it was held that: "Land purchased with partnership funds, and occupied

and used by the firm in conducting its business, is partnership property, although the conveyance is made to the individual members of the firm; and a third person having knowledge of such facts, who takes from one of the partners a mortgage on his individual interest in such land to secure the individual debt of such partner, will be postponed to the lien of a firm creditor whose debt accrued subsequently to the execution of such mortgage."

That case holds that although a mortgagor is a purchaser and entitled to the protection of a *bona fide* purchaser where he acts without notice of the fact that it is a partnership property, yet where he has such notice, his mortgage is subordinated, not only to debts existing at the time the mortgage took effect, but also those arising subsequent to the date of the mortgage.

The statutory lien of Page does not give rise to any question as to the rights of a *bona fide* purchaser; by such lien or by levy the judgment creditor acquires only the interest of his debtor in the premises.

While therefore a mortgagee without notice, finding the legal title in the names of the individual partners, lends money and takes a mortgage on the premises, will be protected as a *bona fide* purchaser, a judgment creditor can make no such claim.

Lovejoy v. Bowers, 11 N. H. 404, is directly in point: That was the case of a mortgage by one partner to secure his separate debt, of "one undivided half, being all his right, title, interest and share" in certain partnership property; followed by a seizure of the property mortgaged, some eighteen months thereafter, to satisfy partnership liabilities. Some of the executions against the partnership, upon which the seizure was made, were founded on claims which accrued prior to the mortgage, and some arose subsequent. The mortgagee knew it was partnership property when he took his mortgage. The partnership having continued after the mortgage, the court say: "We have no means of ascertaining what the surplus might have been when the mortgage was made. There might then have been nothing. All the property now taken by the subsequent creditors may in fact have been supplied by them, or have been derived from profits on contracts made with them, and in that case they have taken nothing to which the plaintiff would have been entitled at the time his mortgage was made. Considered as a mortgage of the interest of one partner in the partnership property, and admitting that such a mortgage might be valid as between the par-

ties, the mortgagee, having permitted the mortgagor to continue the business, could only be entitled to such surplus as might remain after the payment of the partnership debts, whether contracted before or after the execution of the mortgage. He could stand in no better situation than the mortgagor in this respect." Jones on Mortgages, § 120, and cases there cited.

For reasons equally cogent, the same rule applies as between liens of separate creditors on partnership property, and partnership creditors whose claims accrue during the continuance of the partnership, whether prior or subsequent to such liens. *Receivers v. Godwin*, 1 Halsted Ch. 334; Parsons on Partnership, *167 and note (q), also chap. X, § II and notes; 1 Lindley on Partnership, *295 and notes; Story on Partnership, §§ 263 and 274 and notes.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Judge v. Braswell*, 18 Bush, 69; s. c., 26 Am. Rep. 185

Evidence where deed is silent.—Where the deed is silent evidence outside of it may be resorted to. In the absence of any countervailing evidence, a conveyance to two or more, not describing them as partners, vests in them the title to the lands embraced in the deed as tenants in common. The first problem to solve is whether extrinsic evidence can be resorted to, to establish the fact that the property is held by the grantees as partners instead of individually as the deed on its face declares. In Pennsylvania the courts seem to have held that the legal effect of the deed cannot in this manner be affected; but in every case the contest was between innocent purchaser or mortgagee, for value, from the partner or partners in whose name the legal title was vested and who appeared by the record to be vested with both the legal and beneficial interest in the property. *McDermot v. Laurence*, 7 Serg. & Rawle, 438; *Hale v. Henrie*, 2 Watts, 143; *Ebbert's Appeal*, 70 Penn. St. 79; *Le Fevre's Appeal*, 69 Penn. St. 122. But in *Appeal of Second Nat. Bank of Titusville*, 83 Penn. St. 203, the Supreme Court decided that the legal effect of the deed could not be altered even against a judgment creditor of one of the partners who had knowledge that the premises were partnership property. The courts of Pennsylvania however stand alone on this point. All the other decisions enunciate the doctrine that the terms of the deed are not conclusive but open to modification by proof of the circumstance attending the purchase of the property showing an intention to hold it as partnership property or by proof of an express agreement to that effect. *Fairchild v. Fairchild*, 64 N. Y. 471; *Sherwood v. St. Paul R. Co.*, 21 Minn. 127; *York v. Clemens*, 41 Iowa, 95; *Thompson v. Egbert*, 3 Thomp. & Cook, 474. Of course the title of a *bona fide* purchaser for value will not be affected by such proof, for the reason that he has a right to rely upon the record and is under no legal obligation to take notice of any equities or even of any legal rights which are not disclosed by the record.

The rule is declared by the Court of Appeals in *Tarbell v. West*, 86 N. Y.

280-287. "But where the legal title to partnership land is vested in one partner his *bona fide* grantee or mortgagee takes his title free from the equities of the other partners or of copartnership creditors. But if he have notice that the land is partnership assets, he takes subject to their equities." The property may be shown by parol to be partnership, although the legal title is vested in one of the partners. *Fairchild v. Fairchild, supra*.

Intention governs.—There is some uncertainty as to what must be shown in order to establish the facts that the property is to be considered a portion of the firm assets; but the rule which has the support of the best authority and which rests upon sound principle, is that which makes the intention of the parties at the time of taking the conveyance, the proper test. Did the partners intend to keep the property still in the firm; or did they mean to make a division of that portion of the assets among the members of the firm? *Tillinghast v. Champlin*, 4 R. I. 173; s. c., 67 Am. Dec. 570; *Ludlow v. Cooper*, 4 Ohio St. 1; *Collumb v. Read*, 24 N. Y. 505; *Buchan v. Sumner*, 2 Barb. Ch. 165, *Rank v. Grote*, 50 Super. Ct. 275; *Ware v. Owens*, 42 Ala. 212; *Buckley v. Buckley*, 11 Barb. 43-75; *Fairchild v. Fairchild*, 64 N. Y. 471; *City of Providence v. Bullock*, 14 R. I. 853; *Shafer's Appeal*, 106 Penn. St. 49; *Holmes v. Self*, 79 Ky. 297. Some of the cases contain dicta asserting that there must be an agreement between the partners that the property shall be held by them not as tenants in common but as partners. These cases however do not conflict with the rules already referred to. The failure of the partners to express their intention in words will not render it any the less an agreement. Two or more parties cannot tacitly intend that a certain consequence shall result from any transaction without agreeing to be bound accordingly. The rule is clearly stated in *Fairchild v. Fairchild*: "When the land is conveyed to the several partners it is not indispensable that it should be actually used for partnership purposes, nor that a positive agreement should be proved making it partnership property. If it had been paid for with partnership effects, it is then a question of intention whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase-money was severally charged to the members of the firm or whether the accounts treat it the same as other firm property, as to purchase-money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred.

What suffices to show intention — purchase with partnership funds.—The question about which there is the most uncertainty by reason of conflicting decisions and dicta is what facts and circumstances will suffice to establish such an intention, either presumptively or conclusively. The decided preponderance of authority is in favor of the logical rule that the mere fact of the purchase of real property with partnership funds or to pay a debt owing to the firm is sufficient presumptively to evince such an intention, and therefore in the absence of any thing to the contrary is sufficient to justify the conclusion that the real estate is in equity personal property. *Smith v. Jones*, 3 Fairf. 337; *Hoxie v. Carr*, 1 Sumn. 173; *Sigourney v. Munn*, 7 Conn. 11; *Baldwin v.*

Johnson, Saxt. 441; *Forde v. Herron*, 4 Munf. 316; *Deloney v. Hutcheson*, 2 Rand. 188; *Baird v. Baird*, 1 Dev. & Bat. Eq. 524; *Uhler v. Semple*, 20 N. J. Eq. 288; *Richardson v. Wyatt*, 2 Dess. Eq. 471; *Hunt v. Benson*, 2 Humph. 459; *Ross v. Henderson*, 77 N. C. 170; *Wooldridge v. Wilkins*, 3 How. (Miss.) 300; *Thayer v. Lane*, Walk. Ch. 200; *Bryant v. Hunter*, 6 Bush, 75; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Collumb v. Read*, 24 N. Y. 505; *Bopp v. Fox*, 63 Ill. 540; *Price v. Hicks*, 14 Fla. 565; *Cornwall v. Cornwall*, 6 Bush, 369; *Ludlow v. Cooper* 4 Ohio St. 1; see also *King v. Weeks*, 70 N. C. 372; *Holmes v. Moon*, 7 Heisk. 506; *Clark's Appeal*, 72 Penn. St. 142; *Shafer's Appeal*, 106 Penn. St. 49. The case of *Collumb v. Read* is the leading case in this country on the subject. The court was called upon to determine whether certain real estate, the title to which had been taken in the names of two partners, not as partners, but in such manner as would, but for the partnership, make them tenants in common, was partnership property. The real property had been acquired with copartnership effects in collecting debts due to the firm. The Court of Appeals held that the property was in equity the property of the firm and not the individual property of each member of the firm, and that the firm debts must be paid out of it before claims against the partners individually. The court said: "Where the land was not purchased for partnership uses and there was no agreement making it partnership property, and yet it was paid for out of the funds of the partnership or taken in the payment of debts due to it, the question between the two classes of creditors would be one of construction as to the intent of the partners in making the purchase. It might be that such a purchase would be made as an investment of realized profits. If for instance the purchase price should be charged to the separate accounts of the partners that would be an indication that it was considered by them an application of divided profits. If on the other hand the income should be carried into the books of the corporation, or if the land itself should be included in the periodical inventories of stock in trade, there would be an inference more or less strong that it had been agreed to hold the estate as partnership property. Where neither of these features exist, I am of opinion that according to the doctrine of the English courts the land, though paid for out of partnership funds, would retain its original character of real estate, and would be considered as belonging to the several partners according to the legal title as determined by the conveyance. But in a leading case in the late Court of Chancery, decided in 1847, the land was considered as converted for the purpose of subjecting it to the debts of the copartnership upon the single fact that it had been conveyed to the copartners, in payment of a firm debt. Lands were conveyed to the partners, Naylor & Sumner, by a debtor of the firm in satisfaction of the debt. On winding up the affairs of the concern Naylor was obliged to pay out of his own means to the creditors about \$5,000 beyond his ratable proportion of the debts, and for this balance he recovered a judgment against Sumner in the Superior Court; but by mistake the judgment was never regularly docketed, as the chancellor held. Subsequently a judgment was recovered against Sumner by another partner for an individual debt, and then the premises were sold upon a decree of foreclosure of a mortgage older than either of the judgments, and the money was brought into court for distribution.

Upon a reference it was adjudged to belong to Naylor, one-half of it as the owner of an undivided moiety of the premises, and the other half as the judgment creditor of Sumner, the other tenant in common. On the hearing of exceptions to the report, a vice-chancellor confirmed it; and on an appeal to the chancellor, he held that the distribution could not be sustained on the grounds on which it was placed by the master, for he considered the imperfect docket wholly void. But he decided that for the purpose of a liquidation of the co-partnership affairs, the payment of its debts and the division of the assets between the partners, the land was to be regarded as personal property; and he sustained the report on that single ground. The opinion is quite thorough, and it reviews all the cases on the subject, English and American; and the judgment appears to have been acquiesced in, as I do not find that it was brought before this court on appeal. It was not pretended that the land was purchased for or that it was adapted to the use of the firm in its business, or that there was an agreement that it should be considered as partnership property. Several of the cases referred to in support of the chancellor's conclusion showed the additional fact that the land was purchased for partnership use, or that it had been agreed that it should be considered partnership property; but there being no such feature in the principal case, it is a direct authority for the position that it is enough that the purchase should have been made with the partnership funds. *Buchan v. Sumner*, 2 Barb. Ch. 165.

"In the present case the finding of the referee is express to the effect that the three parcels of real estate were acquired 'with copartnership effects in the collecting and receiving of the debts due the said firm.' The referee also states that these parcels of land had always been inventoried and treated, and at the time of the assignment were held as part of the partnership effects and property. This, I think, would be sufficient to sustain this conclusion upon what I have considered the doctrine of the English courts. But I am in favor of placing the case upon the rule established in *Buchan v. Sumner*, because it was a well-considered judgment of the highest equity court of original jurisdiction under the former system, and has been taken as the law of the State for the last fifteen years. It was not moreover a departure from any adjudged case in this State. If it does not conform to the current of English adjudications it establishes, I think, a better practical rule. It is essentially a question as to the *onus probandi*. Where the price of land conveyed to the partner is paid by copartnership money or effects, or it is taken in satisfaction of a debt due the concern, the real estate becomes partnership property, or is individual property according to the legal effect of the conveyance as the intention of the purchaser shall appear to have been. It may be either the one or the other. *Prima facie*, I should say, that where the land was taken in payment of a debt it might be considered in equity as property of the same class as that which was parted with in making the purchase. So much of the undisputed property of the partnership has been exchanged for the land, it may possibly have been thus invested in order to pay a dividend to the several partners to whom the land is conveyed; but the stronger probability would always be in such a case that it was taken as an expedient for collecting a debt. A conclusion which is to be adopted in place of precise proof should always be

in favor of the theory which is most probable; and it is upon this rule that the burden of proof is usually adjusted."

Use by partnership.—All the authorities agree that the facts that the property was bought with partnership money, and that it is used in the partnership business, are sufficient to impress upon the property the character of partnership real estate, and render it in equity personal property. See cases already cited, and *Pugh v. Currie*, 5 Ala. 446; *Boyce v. Coster*, 4 Strobb. Eq. (S. C.) 30; *Works v. Minot*, 10 Cush. 593; *Burnside v. Merrick*, 4 Metc. 537; *Dyer v. Clark*, 5 Metc. 562; *Fall River Whaling Co. v. Borden*, 10 Cush. 407; *Rank v. Grote*, 50 Supr. Ct. 275; *Hiscock v. Phelps*, 49 N. Y. 97.

In *Rammelsberg v. Mitchell*, 29 Ohio St. 22, the court held that if the property was not used for partnership purposes, it was not partnership property, although it was purchased with partnership funds, and the firm received the rents.

The fact that the real estate owned by partners as tenants in common is used in the firm business is not always even *prima facie* evidence that the partners intended to make it partnership property, and therefore personal property in equity. Where the property is not bought with partnership funds, but is either owned by the partners at the time of the formation of the partnership or subsequently purchased by them with their individual money, no intention to make it partnership property will be implied from the mere fact that it is used in the firm business. *Wheatly v. Calhoun*, 12 Leigh, 264; *Pecot v. Armelin*, 21 La. Ann. 667; *Balmain v. Shore*, 9 Ves. 506; *Cowden v. Cairns*, 28 Mo. 471; *Farmer v. Samuel*, 4 Litt. (Ky.) 189; *McDermot v. Laurence*, 7 Serg. & Rawle, 438; *Stemmer's Appeal*, 58 Penn. St. 177; *Coles v. Coles*, 15 Johns. 160; *Skillman v. Purnell*, 3 La. 497; *Bernard v. Dufour*, 17 La. 596; *Gaines v. Catron*, 1 Humph. (Tenn.) 523; *Blake v. Nutter*, 19 Me. 16; *Wooldridge v. Wilkins*, 4 Miss. 360; *Dilworth v. Mayfield*, 36 Miss. 40; *Thompson v. Bowman*, 6 Wall. 316; *Ware v. Owens*, 42 Ala. 215.

Title not in firm name.—Where the partners intend that the property shall be partnership assets, the fact that the title is taken in the name of one of the partners or of a third party will not affect the question. He will hold as trustee for the firm. *Fairchild v. Fairchild*, 64 N. Y. 477; *King v. Weeks*, 70 N. C. 372; *Holmes v. Moon*, 7 Heisk. 506; *Clark's Appeal*, 72 Penn. St. 142; *Price v. Hicks*, 14 Fla. 565; *Indiana Pottery Co. v. Bates*, 14 Ind. 9; *Dewey v. Dewey*, 35 Vt. 555; *Galbraith v. Gedge*, 16 B. Monr. 634; *Sigourney v. Munn*, 7 Conn. 17; *Mallack v. James*, 18 N. J. Eq. 128; *Lacy v. Hall*, 37 Penn. St. 361; *Houston v. Stanton*, 11 Ala. 420; *York v. Clemens*, 41 Iowa, 95; *Sherwood v. R. Co.*, 21 Minn. 127; *Drewry v. Montgomery*, 28 Ark. 256; *Little v. Snedecor*, 52 Ala. 160; *Shafer's Appeal*, 106 Penn. St. 49; *Rank v. Grote*, 50 N. Y. Superior, 275; *Brewer v. Brown*, 68 Ala. 210; *Shaks v. Klein*, 104 U. S. 18.

Descent of the property — English rule.—The English courts have uniformly treated such real estate as personal property for all purposes except the transmission of it on the death of the owners after paying debts and adjusting the equities between the parties. Whether the property will descend to the heirs or will pass to the personal representatives in England is involved in uncertainty, but the weight of the more recent English cases is in favor of the absolute

conversion of the realty into personal property for all purposes whatsoever. Lord THURLOW first inclined to this view in *Thornton v. Dixon*, 8 Bro. Ch. Cas. 199, that the personal representatives would take; but he subsequently came to a different conclusion, and decided that the heirs took their ancestor's share after paying debts, etc. This decision was followed in *Bell v. Phyn*, 7 Ves. 453, and *Balmain v. Shore*, 9 Ves. 500; and the cases of *Rowley v. Adams*, 7 Beav. Ch. 548; *Randall v. Randall*, 7 Sim. 271, and *Cookson v. Cookson*, 8 Sim. 519, are to the same effect. But in *Townsend v. Devaynes*, 1 Mont. Part. Appx. 101, Lord ELDON overruled the prior decisions, and held that the conversion was unqualified, and that therefore the personal representatives took instead of the heirs. Since this decision the authorities in support of the doctrine enunciated by it are quite numerous. *Sellerig v. Davies*, 2 Dow. P. C. 231; *Phillips v. Phillips*, 1 Myl. & Keen. 649; *Broom v. Broom*, 8 Myl. & Keen, 443; *Houghton v. Houghton*, 11 Sim. 491; *Morris v. Kearsley*, 2 Young & Coll. 189.

The current of authority however does not all run in that direction. The case of *Ripley v. Adams*, *supra*, holding a different doctrine, was subsequently decided. The cases of *Ripley v. Waterworth*, 7 Ves. 429, and *Smith v. Smith*, 5 Ves. 189, cannot be considered authority in support of the rule laid down by Lord ELDON, as they both were decided upon the peculiar language of the deeds, which evinced an intention on the part of the partners to have the land absolutely converted into personal estate.

The recent case of *Attorney-General v. Hubbuck*, 80 Alb. L. J. 118, seems to settle the law in England in accordance with Lord ELDON's views.

American rule.—The English doctrine, as enunciated by the later cases, is not followed in this country. Every authority is in favor of the rule, that when the objects for which the fiction of a conversion was adopted have been accomplished, the principle of equitable conversion has no further application, and that the remainder of the property, or its proceeds in case of a sale, to settle partnership affairs, is real estate, and as such descends to the heirs at law. *Yeatman v. Woods*, 6 Yerg. 20; *Wilcox v. Wilcox*, 13 Allen, 252, *Whitman v. Boston R. Co.*, 8 Allen, 134; *Patterson v. Blake*, 12 Ind. 438; *Smith v. Wood*, 1 N. J. Eq. 82; *Buchan v. Sumner*, 2 Barb. Ch. 206; *Buckley v. Buckley*, 11 Barb. 44; *Foster's Appeal*, 74 Penn. 391; *Fairchild v. Fairchild*, 64 N. Y. 471-478; *Houston v. Stanton*, 11 Ala. 420; *Collumb v. Read*, 24 N. Y. 505.

In *Fairchild v. Fairchild* the court say: "In this country real estate belonging to a partnership for the purpose of paying the debts and adjusting the equities between the members of the firm, is treated as personal property; and what remains is considered and treated as real estate, which would go to the heirs and partners according to their interests. This conclusion was reached by the chancellor in an elaborate opinion in *Buchan v. Sumner*, 2 Barb. Ch. 165-200, reviewing all the American authorities; and was approved and adopted by this court in *Collumb v. Read*, 24 N. Y. 505. The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons; and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives, and not to the heir,

probably on account of the great injustice which would result by the laws of inheritance in England. But the American rule, that the remainder descends to the heirs, does not affect the character of the property, as partnership effects, except that the incidents and qualities of real estate are revived."

Preference of firm creditors.—All of the cases agree that real estate which forms a portion of partnership assets is subject to firm creditors in preference to creditors of individual members of the firm, although the title to the property stands in the names of the partners individually, and not as partners. The courts uniformly hold that an individual creditor secures no priority by levying an attachment on the property or by the recovery of a judgment against the partners in whom the legal title, or a portion thereof, is vested. The theory upon which the courts proceed in establishing this doctrine is that the individual creditor can reach only the interest of the debtor after the firm debts are paid and equities between the parties settled. The cases which sustain these principles are very numerous. *Ross v. Henderson*, 77 N. C. 170; *Divine v. Mitchum*, 4 B. Monr. 488; *Lime Rock Bank v. Phettoplace*, 8 R. I. 56; *Fowler v. Bailey*, 14 Wis. 125; *Little v. Snedecor*, 52 Ala. 167; *York v. Clemens*, 41 Iowa, 95; *Mauck v. Mauck*, 54 Ill. 281; *Soruggs v. Blair*, 44 Miss. 406; *Jarvis v. Brooks*, 27 N. H. 87; *Bank of Louisville v. Hall*, 8 Bush, 672; *Willis v. Freeman*, 35 Vt. 44; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 839; *Bopp v. Fox*, 63 Ill. 540; *Hunt v. Benson*, 2 Humph. 459; *Blaks v. Nutter*, 19 Me. 16; *Uhler v. Semple*, 20 N. J. Eq. 288; *Lang v. Waring*, 35 Ala. 625; *Duhring v. Duhring*, 20 Mo. 174; *Sigourney v. Munn*, 7 Conn. 11; *Davis v. Christian*, 15 Gratt. 11; *Russell v. Miller*, 26 Mich. 1; *Matlock v. Matlock*, 5 Ind. 403; *Dupuy v. Leavenworth*, 17 Cal. 262; *Price v. Hicks*, 14 Fla. 565; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Digg's Adm'r v. Brown*, 78 Va. 292; *Messer v. Messer*, 59 N. H. 375.

Dower.—The question of the widow's right to dower in real estate, which constitutes a portion of partnership assets, is not definitely settled, but the decided weight of authority is in favor of the doctrine that for the purpose of paying debts and adjusting equities between partners, it is to be regarded as personal property as to the widow, and that the only right she has in the property is in her husband's share after paying debts and adjusting equities. The following cases support this rule: *Huston v. Neil*, 41 Ind. 505; *Howard v. Priest*, 5 Metc. 582; *Cobble v. Tomlinson*, 50 Ind. 550; *Dyer v. Clark*, 5 Metc. 562; *Richardson v. Wyatt*, 2 Dess. Eq. 471; *Greene v. Greene*, 1 Ham. (Ohio) 544; *Wooldridge v. Wilkins*, 8 How. (Miss.) 860; *Killet v. Brown*, 65 Mo. 188; s. c., 27 Am. Rep. 265.

In *Huston v. Neil* the court held that it was unnecessary for the wives of partners holding real estate for partnership purposes to join with them in executing a mortgage on or deed of the property; that the right of a widow to dower in such real estate depended upon there being a balance left after discharging firm debts and settling the rights of the partners as between themselves, and that the dower would attach to only her husband's interest in such balance.

In *Richardson v. Wyatt*, it appeared that the deceased husband of the widow who claimed dower in partnership real estate was indebted to the firm for

more than the amount of his share. The court held that she was not entitled to dower. To same effect is *Greene v. Greene*.

In the case of *Smith v. Jackson*, 2 Edw. Ch. 28, an attempt is made to show that the decision in *Greene v. Greene* was placed by the Supreme Court of Ohio upon the ground that the partnership agreement provided for a sale of all firm property on dissolution. But it is difficult to see how an express agreement for sale materially affects the question. In contemplation of law the partners always agree that the estate belonging to the firm shall be disposed of to pay partnership debts when other assets are insufficient. An express agreement to that effect imposes no additional or higher obligation upon them in this respect. In equity, it is personal property until debts are paid and equities adjusted, and there is no reason why it should not be personal property as to the widow as well as against the individual creditors. But the case of *Smith v. Jackson* is an express authority the other way. See also *Cobble v. Tomlinson*, 15 Ind. 550, and *Barry v. Briggs*, 22 Mich. 201.

One important question is correctly decided by the case of *Smith v. Jackson*. Mrs. Jackson's husband had a two-thirds interest in the firm business, but held the legal title to only one-half of the firm real property. The court held that she was entitled to dower not in two-thirds but in only one-half of the surplus, as that was the extent to which he was seized of the legal title. The vice-chancellor said: "Mrs. Jackson is entitled to dower in the share of the estate of which the legal title was coupled, with a beneficial ownership in her husband, notwithstanding it was partnership property. It can only extend however to a moiety. The legal title was not in him beyond this, although his interest in the partnership was a two-thirds."

After dissolution.—Where after dissolution of a partnership one partner takes in his own name a conveyance of real estate in satisfaction of a partnership debt, it is partnership property with all the incidents and qualities of partnership real estate. *Gannett v. Cunningham*, 84 Me. 62. Partnership real estate may be sold by the survivor for partnership purposes, even though the legal title is not in him. His conveyance transfers the equitable title, and the court will compel the heirs to execute a sufficient conveyance to vest the legal title in the purchaser. *Andrews v. Brown*, 21 Ala. 437; *Bird v. Morrison*, 12 Wis. 153; *Ludlow v. Cooper*, 4 Ohio St. 9; *Dupuy v. Leavenworth*, 17 Cal. 267; *Murphy v. Abrams*, 50 Ala. 298; *Kleine v. Shanks*, 15 Alb. L. J. 16; *Delmonico v. Guillaume*, 2 Sandf. Ch. 866; *Shanks v. Kleine*, 104 U. S. 18. And the survivor may sell it, although it is not necessary to sell it to pay firm debts. *Solomon v. Fitzgerald*, 7 Heisk. 552; *McAlister v. Montgomery*, 8 Hayw. 94.

But a sale will not be ordered on dissolution unless the interests of all the partners require it. *Pierce v. Carey*, 37 Wis. 252. An application to the court for leave to sell is the best course to pursue. *Buffum v. Buffum*, 49 Me. 108; *Shearer v. Paine*, 12 Ala. 589. Of course on a sale for partnership purposes, the surplus, after discharging debts and settling the rights of the partners as between themselves, is real estate and goes to the heirs. *Foster's Appeal*, 74 Penn. St. 391. See *Wiegand v. Copeland*, 14 Fed. Rep. 128.

Partnership to deal in real estate.—That a valid partnership may be formed

Fleig v. Sleet.

for the sole purpose of dealing in real property is declared to be the law by all the adjudications. *Benton v. Roberts*, 4 La. Ann. 216; *Rowland v. Booser*, 10 Ala. 694; *Patterson v. Ware*, 10 Ala. 447; *Henderson v. Hudson*, 1 Munf. (Va.) 415; *Bird v. Morrison*, 12 Wis. 152; *Smith v. Burnham*, 3 Sumn. 463; *Chester v. Dickerson*, 54 N. Y. 1; s. c., 13 Am. Rep. 550; *Fairchild v. Fairchild*, 64 N. Y. 471; *Traphagen v. Burt*, 67 N. Y. 80; *Williams v. Gillies*, 75 N. Y. 197.

Whether a valid partnership to deal in real property can be created by parol is somewhat mooted. This subject will be considered hereafter.

FLEIG v. SLEET.

(43 Ohio St. 51.)

Payment — worthless check.

A check of a third person, given and accepted in payment of a demand, and by both parties supposed to be good, but proving worthless, is not payment.*

ACTION on an account. The opinion states the case. The defendant had judgment at trial, which was reversed in the District Court.

W. D. Young, for plaintiff in error.

G. W. Harding, for defendant in error.

McILVAINE, C. J. It appears from the testimony set out in the bill of exceptions that on July 11, 1876, the plaintiff in error remitted by mail from Ripley, Ohio, where he resided, to Sleet & Rose, defendants in error, at Cincinnati, Ohio, where they resided, a check or draft for \$61.77, drawn by Reynolds & Co., bankers at Ripley, Ohio, on E. Kinney & Co., bankers at Cincinnati, Ohio, payable to the order of H. Fleig (plaintiff in error), and by him indorsed to Sleet and Rose in payment of the account upon which suit is brought; that on the following day Sleet & Rose received the check by due course of mail, and immediately remitted to Fleig a receipt as follows:

* To same effect, *Weaver v. Nixon*, 69 Ga. 699. See also *Koonce v. District of Columbia*, ante, 278.

Fleig v. Sleet.

“CINCINNATI, *July 12, 1876.*

“Received of H. Fleig, Esq., sixty-one and $\frac{11}{100}$ dollars, in payment invoice teas, February 28.

\$61.77.

SLEET & ROSE.”

It further appears that Sleet & Rose did not present the check to E. Kinney & Co. for payment until July 15th, when payment was refused on the ground that the drawers had no funds in the bank subject to draft. Whereupon the check was immediately returned to Fleig by letter, with information of the dishonor, and a request that Fleig should remit the amount of the account. This letter was duly received, but was not answered before suit was brought on the account.

Reynolds & Co. failed on the 11th of July, the same day the check in question was drawn, having overdrawn their account with E. Kinney & Co. on the previous day, July 10th. E. Kinney & Co. however continued to honor the drafts of Reynolds & Co. until July 12th, when the failure of the latter was first learned by the former. Payment of the check in question would have been refused by E. Kinney & Co. at any time after notice of the failure. No question is made in this case as to the liability of Fleig as indorser on the check alleged to have been used as the medium of payment on the account sued on. The delay of the indorsees in presenting the same for payment to the drawees may be assumed as negligence under the law merchant, whereby the indorser as such was discharged.

Neither is there any doubt as to the fact that the parties agreed that the transfer of the check was in payment of the account. The sole question is, was the agreement under the circumstances set forth a valid contract, whereby the former relations of debtor and creditor, on account of goods sold and delivered, was in law extinguished.

It is not controverted that where a debtor makes and delivers a check to his creditor in payment of an account, upon a bank where the debtor has neither funds nor credit, it is not a payment of the account, although the creditor receives it as such. In such case there is no satisfaction of the indebtedness; such check is valueless. By its delivery it is impliedly represented that there are funds in the hands of the drawee subject to its payment. Relying on this representation, it is accepted as payment. Its falsity relieves the creditor from his agreement, no matter whether the

Street Railway v. Eadie.

act of the debtor is fraudulent or *bona fide*. The agreement is without consideration and void. The account remains an existing and continuing cause of action.

Is there any difference in effect between the case put and one where the debtor indorses to his creditor a worthless check drawn by a third person who has no funds subject to its payment? We think not. In the hands of the debtor before indorsement it was without value. From the act of indorsement a similar representation is implied, on the faith of which it is taken as payment by the creditor. Between the debtor and creditor there is an accord, but no satisfaction. In law, it is like payment in counterfeit money, or broken bank bills. The claim thus intended to be paid remains a subsisting cause of action.

If by the delay of Sleet & Rose in presenting the check for payment, any prejudice had resulted to Fleig, a different question might have arisen in the case. But no such prejudice is shown. There were no funds in the hands of the drawees subject to the payment of the check at the time it was drawn or subsequent thereto. It would not have been paid if presented at the close of banking hours on the day it was received.

The drawers, Reynolds & Co., had failed before the receipt of the check by Sleet & Rose; hence no question other than the one above considered has been raised in this case.

The views we have above expressed are supported by several decided cases, from which we cite *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass. 422.

Judgment affirmed.

STREET RAILWAY V. EADIE

(43 Ohio St. 91.)

Negligence — imputable.

SUFFICIENTLY reported, *ante*, 144.

Street Railway Company v. Bolton.

STREET RAILWAY COMPANY V. BOLTON.

(43 Ohio St. 224.)

Master and servant — negligence — passenger assisting car driver.

The plaintiff was a passenger on a car of a street railway having but one track, with occasional turn-outs. In turning out to avoid a car coming in the other direction, the car ran beyond the turn-out, and the driver requested the plaintiff to assist him in backing it upon the turn-out. While so engaged he was injured by the negligence of the driver of the other car. *Held*, that the railway company was liable. (*See note, p. 805.*)

ACTION for personal injuries by negligence. The head-note states the case. The plaintiff had judgment below.

Frank H. Southard, for plaintiff in error.

Evans & Beard, for defendant in error.

MOLLVAINÉ, C. J. It is undoubtedly a well established principle of law that a master who is guilty of no carelessness in employing servants is not liable to one for injuries caused by the carelessness of a fellow-servant, while both are engaged in the common service, and no relation of subordination exists between them. In such case each servant assumes the risk of injuries from the carelessness of fellow-servants.

It is also well settled that a person who without any employment voluntarily undertakes to perform service for another, or to assist the servants of another in the service of the master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in the relation of a servant for the time being, and is to be regarded as assuming all the risks incident to the business.

But it does not follow that under all circumstances a person who assists the servants of another in the discharge of their duties, without employment by the master, is to be regarded as voluntarily assuming the relation of a fellow-servant, or the risks pertaining to that relation. To illustrate, suppose a servant in driving his master's team on the highway founders in such a manner as to prevent the use of the highway by others for the time being. An-

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other person, who is thus impeded in the use of the road, assists the servant, either with or without request, to remove the impediments to travel from the highway. Such other person does not thereby become the fellow-servant of the driver. Indeed in no just sense has he voluntarily entered the service of the master. And the rule of law first above stated does not apply to the case supposed, and therefore it was not error in the Court of Common Pleas to refuse it.

The law of the case was properly given in the charge.

The plaintiff in the Court of Common Pleas was not a mere volunteer, within the meaning of the rule of law contended for by plaintiff in error, but as a passenger on the north-bound car, was interested in having it driven to its destination. To this end it was necessary to pass the south-bound car. This could only be accomplished by pushing the north-bound car back upon the siding. In doing this, although it may not have been absolutely necessary for the passenger to assist the driver, it was a prudent and reasonable act, justified by the circumstances of the case; not a wrongful interference and intermeddling with business in which he had no concern. It was not in fact or in law an assumption of risk from the carelessness of the defendant or any of its servants.

The law in this case is well stated in *Wright v. London and N. W. R. Co.*, 1 Q. B. Div. 252. That case was this: "The plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse-box to the siding, from which alone the heifer could be delivered to the plaintiff, in order to save delay he assisted in shunting the horse-box, and while he was so assisting he was run against and injured through a train being negligently allowed by the defendants' servants to come out of the siding. There was evidence that the station-master knew that the plaintiff was assisting in the shunting, and assented to his doing so. *Held*, affirming the decision of the Queen's Bench, that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises, with their consent, for the purpose of expediting the delivery of his own goods; and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes v. North-Eastern Ry. Co.*, L. R., 4 Ex. 254; 6 Ex. 123."

Judgment affirmed.

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NOTE BY THE REPORTER.—*Flower v. Penn. R. Co.*, 69 Penn. St. 210; s. c., 8 Am. Rep. 251; *Knox v. Lincoln R.*, 68 Me. 49; s. c., 28 Am. Rep. 16; and *N. O. etc., R. Co. v. Harrison*, 48 Miss. 112; s. c., 12 Am. Rep. 356, seem to the contrary of the principal case, but are distinguishable on the ground pointed out in *Thomp. Neg.*, § 1045, that the plaintiff in the principal case was “expediting his own business,” and was therefore not a mere volunteer. But in *Potter v. Faulkner*, 1 Best. & S. 800, the defendants’ porters were lowering bales of cotton from his warehouse, and his carter was loading them, and the plaintiff waiting with a wagon to receive a load for his master, was requested by the carter to assist him, and in doing so was injured by the negligence of the defendants’ porters; *held*, that defendant was not liable. Approving *Degg v. Midland Ry. Co.*, 1 H. & N. 773. “Such a one cannot stand in a better position than those with whom he associates himself.”

In *Cleveland v. Spier*, 16 C. B. (N.S.) 398, the defendant’s gas-fitter, coming upon two pipes while digging in a road, asked information of the plaintiff passing as to which contained gas. The plaintiff got into the trench and pointed out the main, and while there was carelessly injured by the gas-fitter in the performance of his work. *Held*, that defendant was liable.

In *Mayton v. Tex. & Pac. R. Co.*, 63 Tex. 77; s. c., 51 Am. Rep. 637, there was a request by the servant, but it was held that the plaintiff was a volunteer notwithstanding. See Moak’s *Underhill Torts*, 63.

Althorf v. Wolfe, 22 N. Y. 355, holds that the master is liable for an injury to a third person by the negligence of one who volunteered or was requested by his servant to assist his servant.

 RAILROAD COMPANY V. SHULZ.

(43 Ohio St. 270.)

Evidence — opinion — sufficiency of fence.

On the question of the sufficiency of a fence to turn stock, non-expert witnesses may not give their opinion.

ACTION for the value of a horse killed. The head-note states the point.

Newbegin & Kingsbury, for plaintiff in error.

George E. Seney, for defendant in error.

OWEN, J. [Omitting minor points.] A more serious and difficult question arises upon the exception of the defendant below to the admission of the testimony of non-experts who were permitted

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to give their opinions concerning the sufficiency of the fence in question. It is maintained by the defendant that the witnesses should have been restricted in their testimony to statements of facts concerning the condition of the fence; and that to the jury should have been left the determination of the sufficiency of the fence, upon the facts so testified to, unaided by the mere opinions of the witnesses upon the subject.

The question presented for our determination is whether the present case comes within any of the exceptions to the general rule that witnesses must testify to facts and not opinions. An examination of some leading cases upon this question will show that there is no iron rule by which it may be determined when mere opinions of witnesses will be received as evidence, but that it depends chiefly upon the peculiar subject of investigation and the circumstances of each case. In *Crane v. Northfield*, 33 Vt. 126, a witness was asked his opinion whether a certain bridge or culvert was safe and sufficient. The question was excluded. POLAND, J., says: "This was the very question that the jury were to try and decide, and it does not appear to us that there could be any difficulty in having the condition of the culvert so described to the jury by the witness that they would be just as capable of exercising their judgments and forming a correct opinion as the witness himself."

Commonwealth v. Sturtivant, 117 Mass. 122; s. c., 19 Am. Rep. 401, is a leading case in this country, upon the authority of which it is maintained that the opinions of witnesses may be received as evidence. In this case a witness familiar with blood, who had examined, with a lens, a blood stain on a coat, when it was fresh, and who testified to its appearance at the time he examined it, and that it was not in the same condition at the trial, was permitted to testify that its appearance when he examined it indicated the direction from which it came, and that it came from below upward, although he had never experimented with blood or other fluids in this respect. It was held that the testimony was properly admitted. ENDICOTT, J., says: "The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has

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been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice." It was assumed in this case that the subject-matter of the testimony could not be reproduced or described to the jury as it appeared to the witness at the time.

In *Bliss v. Wilbraham*, 8 Allen, 564, it was held that the opinion of a witness concerning the safety and general condition of a bridge was properly excluded.

In *Montgomery v. Scott*, 34 Wis. 345, one of the issues was whether the road in question was defective at the time of the injury. The opinion of a witness was asked whether the road was in a good, passable condition. COLE, J., says: "It is very obvious that the question was properly excluded, since it was calling for the opinion of the witness upon the very issue which the jury were to determine, and where such opinion was not admissible. If the witness knew any facts relating to the condition of the road, he should have stated them and left the jury to draw their own conclusions from these facts.

* * * From the nature of the case the jury were quite as competent to form a judgment as to the sufficiency or insufficiency of the highway from facts submitted on that subject, as the witness could be; and it is very apparent that this was the issue they were to try and determine."

In *Kelley v. Fond Du Lac*, 31 Wis. 179, the safety of a highway was in issue. A witness was permitted to testify to his opinion concerning its safety. This was held to be error; and that he could testify only to facts, from which the jury were to determine whether the road was safe.

This case was followed and approved in *Griffin v. Willow*, 43 Wis. 509.

In *Veerhusen v. Ry. Co.*, 53 Wis. 689, it was held that the mere opinion of a witness upon the question whether a certain bank of earth between defendant's track and land occupied by the plaintiff was "as good a protection against cattle as a fence four and a half feet high," was inadmissible. ORTON, J., says: "An objection to this question was properly sustained. It asks for the mere opinion of the witness upon a matter concerning which, with the same knowledge of the facts, the opinion of any one else would have as much weight; and the jury should not be influenced by the opinion of any one who is not more competent to form one than themselves;

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and they should be left free to form their own opinion after hearing all of the evidence. To extend expert testimony so far would include almost any thing which is the subject of common observation."

In *Enright v. S. & S. B. R. Co.*, 33 Cal. 230, the principal issue was the sufficiency of a fence to turn stock. It was held: "The opinion of experts is not admissible on the question of the sufficiency of a fence to turn cattle." SCHAEFFER, J., says: "The facts were to be testified to by the witness; but the question of sufficiency was with the jury, and not the witness. * * * The habits and instincts of domestic animals, and the kind of fence necessary to restrain them, are so far matters of general observation and experience that a jury, coming from the body of a county, may be relied on to deal with questions like the one in hand with all desirable accuracy, though unaided by the opinion of persons claimed to be experts."

In *Sowers v. Dukas*, 8 Minn. 23, it was held that: "The opinions of a witness cannot be received as evidence, except where the question is one of science or skill, or has reference to some subject upon which the jury are supposed not to have the same degree of knowledge with the witness."

The issues in that case involved the sufficiency of a fence to turn stock. A witness was asked the question: "Was the fence a proper fence to turn stock, and could they easily put their heads through between fence and rider?"

ATWATER, J., delivering the opinion, says: "We think the objection was well taken, and the question should have been excluded. * * * In this case the question was not one involving or requiring science or skill to arrive at a just conclusion, nor can there be any presumption that the jury were not as competent judges as to what fence was sufficient to turn stock as the witness. It does not appear that he had any peculiar sources or means of knowledge on the subject, which are not to be presumed equally within the reach of the jury. The jury are to form opinions; the witness to state facts. The height of the fence, the materials of which it was composed, its condition as to stability, soundness, etc., might all be very pertinent facts to be stated to the jury, upon which to base their judgment as to the sufficiency of the fence to turn stock, or whether it was in compliance with the contract. But the defendant was entitled to the judgment of the jury on the sufficiency of the

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fence, and that judgment could not rightfully be aided by the mere opinions of a witness, who as far as appears had no means of information beyond their own."

Coming to the adjudications of this court, a thoughtful examination will show them to be in entire harmony with the rule of the cases cited.

Clark v. State, 12 Ohio, 483; s. c., 40 Am. Dec. 481, was one of the pioneer cases holding that on questions of insanity, witnesses, other than professional men, may state their opinions, in connection with the facts on which they are founded.

In that case, BIRCHARD, J., says: "A careful daily observer of a person feigning madness would witness innumerable acts, motions and expressions of countenance, which with the attending incidents and circumstances conclusively satisfy him of the fictitious character of the malady, but which he could never communicate to a jury or a scientific man, so as to give them a fair conception of their real importance."

In *Steamboat Clipper v. Logan*, 18 Ohio, 375, it was held that one conversant with steamboats, as master, engineer and builder, having examined a boat injured on the Ohio river, may state in connection with the facts his opinion as to the direction from which the boat was struck at the moment of contact. Also that any such person, having examined the injured boat, may describe her condition, and say whether in his opinion she is worth repairing. SPALDING, J., says: "With the fullest description of the nature and extent of the injury, the triers of the case, farmers and mechanics, perhaps ignorant of such matters, would be liable to err in their estimate of the damages, from a supposition that the wreck was susceptible of being repaired and put to use for purposes of commerce. The opinion of one conversant with steam navigation, and who had examined the shattered vessel, was necessary to instruct the minds of the jury and enable them to arrive at a correct conclusion upon that subject."

A case relied upon to sustain the admissibility of the opinions of witnesses in such cases is *Stewart v. State*, 19 Ohio, 302; s. c., 53 Am. Dec. 426. In that case it was held to be competent for the defendant to ask a witness who had seen the transaction (a homicide) whether when the deceased rushed on him, there was time enough for him to escape, and get out of the way before the deceased rushed on him. CALDWELL, J., says: "It is true, as a general rule

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that the opinion of a witness cannot be given — the witness relating the facts from which the jury form their opinion. The rule however is not universal. The fact here sought to be proved, to-wit, that the defendant could not avoid the conflict, could not be well proved to a jury by a statement of facts. * * * A variety of circumstances that could only be perceived, but not detailed, would constitute the aggregate from which the opinion would be formed." See *State v. Rhoads*, 29 Ohio St. 171, where this case is distinguished.

In *Protection Ins. Co. v. Harmer*, 2 Ohio St. 456, RANNEY, J., commenting upon apparently conflicting holdings of other courts on this question, says: "In this conflict of opinion there is no resource left but to return to the principle upon which such evidence is ever received. The general rule certainly is, that facts only can be given in evidence, and the necessary and natural deduction from them must be made by the jury. In everything pertaining to the ordinary and common knowledge of mankind, jurors are supposed to be competent, and indeed peculiarly qualified to determine the experienced connection between cause and effect, and to draw the proper conclusion from the facts before them. * * * If the answer can be given from ordinary experience and knowledge, the jury must respond to it unaided; if the effects of such a cause are only known to persons of skill, and are to be determined only by the application of some principle of science or art, such persons may give the results of their own investigation and experience to the jury in the way of opinions, the better to enable them to come to a correct conclusion."

In *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520, it was held that in an action against a turnpike company for injuries occasioned to the plaintiff, by falling into a hole or excavation in its road, it is not competent for witnesses to give their opinions as to whether the place in question was dangerous.

WELCH, C. J., says: "Whether that place in the road was dangerous was a question for the jury and not for the witnesses. It was not a question of science or art, nor was it one where the jury could not be put in possession of all the facts necessary to its decision. The witnesses should have been confined to a statement of these facts, and their opinions should have been rejected."

The witnesses in this case were said to be in no sense adepts, and importance seems to be given to this consideration by the chief justice in his opinion.

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These cases are in entire harmony with the numerous cases relied upon to support the testimony given below, which hold that the opinions of non-experts, who state, so far as is practicable, the facts on which the opinions are grounded, will be received on questions of identity as applied to persons, things, animals, or handwriting; and of the size, color and weight of objects; of time and distances; of the mental state or condition of another; of insanity and intoxication; of the affection of one for another; of the physical condition of another as to health or sickness (in which latter case however the opinion of a non-expert will not be heard upon the particular disease or cause thereof); of values; of the soundness of animals; and of all subjects where it is not practicable nor possible to put the jury in possession of all the primary facts upon which the opinions of the witnesses are grounded. *Commonwealth v. Sturtevant, supra*; 1 Whart. Ev., §§ 436, 513; 1 Greenl. Ev., § 440, and cases there cited.

For a witness to undertake to place before a jury all the facts and symptoms from which he had formed the opinion that a person was angry, drunk, sick, in love, or insane, would be to abandon himself to a hopeless attempt at mimicry and undignified descriptions and imitations, as ludicrous as they would be vain and unprofitable. This serves to illustrate the necessity of the exception to the rule.

It has too frequently been assumed, both by judges and text-writers, that there is a sharp conflict of opinions and adjudications upon this subject. On the contrary, a thorough and careful review of the authorities has satisfied the writer of the present opinion that there is marked uniformity in the views expressed by authors and judges concerning the general principles which underlie this whole subject; the apparent conflict of opinion arises rather in the application of these principles to the particular cases under consideration.

A few general propositions are submitted, which it is believed fairly reflect the current of authority on the subject of the admissibility of the opinions of witnesses as evidence.

1. That witnesses shall testify to facts and not opinions is the general rule.

2. Exceptions to this rule have been found to be, in some cases, necessary to the due administration of justice.

3. Witnesses shown to be learned, skilled or experienced in a particular art, science, trade or business, may, in a proper case, give

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their opinions upon a given state of facts. This exception is limited to experts.

4. In matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry.

5. In such cases the witnesses are required, so far as may be, to state the primary facts which support their opinions.

6. Where it is practicable to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted in their testimony to such facts, and the jurors left to form their opinions from these facts, unaided by the mere opinions of the witnesses.

7. As the warrant for the admission of the opinions of witnesses as evidence is found in some exception to the general and very salutary rule which requires that only facts be stated to the jury, it is the duty of a reviewing court to see that the admission of mere opinions as evidence was within some one of the established exceptions to such general rule; and where it does not appear upon the whole record but that the jury was equally capable with the witnesses of forming an opinion from the facts stated, it is error to admit in evidence the opinions of witnesses.

In the present case many of the witnesses did not show themselves possessed of any peculiar knowledge of, nor means of forming a judgment concerning the fence in question, or the habits of domestic animals. Testimony was admitted of mere opinions, unaccompanied by a statement of any of the facts upon which they were founded. The subject of the testimony was a board fence. So far as the record discloses, it was capable of such description as to height, kind of materials, manner of construction, stability or otherwise, as would enable a jury to form an intelligent judgment as to its sufficiency to turn stock. For any thing that appears in the record, the jurors were as familiar with the habits of domestic animals, and as capable of forming opinions as to the sufficiency of the fence to turn stock as the witnesses themselves.

The witnesses should have been restricted in their testimony to the facts, and the jury left free to form an opinion upon them, uninfluenced by the mere opinions of witnesses.

It must not be supposed that there is any rule of evidence con-

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cerning the opinions of witnesses which is peculiar to fences, highways, bridges or steamboats, or to any other special subjects of investigation. Where the facts concerning their condition cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury.

For the error above indicated, the judgments below are reversed and a new trial ordered.

Reversed and remanded.

HOUSE V. VINTON NATIONAL BANK.

(43 Ohio St. 346.)

Negotiable instrument—notice of protest—indorser having made general assignment.

Notice of protest must be given to an indorser although he has made a general assignment for the benefit of creditors. (*See note, p. 818.*)

ACTION on a note. The head-note states the point. The plaintiff had judgment below.

D. B. Hubbard and C. C. Aleshire, for plaintiff in error.

Nash & Jones and H. C. Jones, for defendant in error.

MOLLVAINE, C. J. The question in this case is whether notice of the dishonor of a promissory note, at its maturity, given by the indorsee to the assignee in insolvency of the indorser, when no such notice is given to the indorser, is sufficient to charge the indorser, or the assigned estate, with the payment of the claim in the hands of the indorsee.

By the assignment trust is created in the assignee. Beneficiaries of the trust are, first, those having liens upon the trust estate; second, the creditors of the assignor; third, the assignor himself. The mode of administering the trust is regulated by statute.

It is not contended in this case that the claim of the bank, as indorsee, is in any sense a lien on the trust property, or should be preferred to the claims of general creditors.

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In the administration of an assignment, the assignee or trustee is required to file accounts in the Probate Court, and section 6356 of Revised Statutes provides: "Whenever, on settlement, the same shall show a balance remaining in the hands of said assignee or trustee, subject to distribution among the general creditors, a dividend shall be declared by the Probate judge, payable out of such balance, equally among all the creditors entitled, in proportion to the amount of their respective claims against the assignor, including those disallowed, as to which the claimant has begun proceedings to establish the same as hereinbefore required, and claims held under advisement; of the making of which dividend and of the time and place of payment thereof, notice shall be given by advertisement once, in a newspaper published and of general circulation in the county in which such is being administered, and in such other way as the court may order; of the payment of which dividends and those remaining uncalled for and unpaid at that time, report shall be made within sixty days after the day fixed for the payment of the same; the court shall then cause a new notice to be given to the owners of the unpaid dividends, in such way as the court may direct; and if the same are not demanded within twelve months thereafter, the same shall be divided *pro rata* among the other creditors, until they are paid in full, and the remainder, if any, to the assignor or his legal representatives. The dividends reserved for claims disallowed or held under advisement, when the proceedings to enforce their allowance have been commenced, as to claims disallowed, shall be held until said proceedings have terminated when they shall be paid, if the allowance of the claim has been ordered on the same; otherwise they shall be distributed *pro rata* among other creditors not paid in full, or refunded to the assignor as the case may require."

It appears to me too plain for discussion, that the fund subject to the payment of general creditors of the assignor, can be used for no other purpose, and that any balance not so used must be refunded to the assignor. It therefore follows that inasmuch as the bank has no lien on the property assigned which constitutes it a preferred claimant, if it be not a creditor of the assignor, it would be palpably unjust to the general creditors as well as to the assignor himself, to appropriate a portion of this fund to the payment of the note in suit.

It is certainly unnecessary to say any thing more to show that the trust property is not liable for the payment of this note, unless the

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liability of Aleshire, the indorser and assignor, has been fixed by the notice of dishonor given his assignee. To so hold would be equivalent to holding that Aleshire is liable for the debt of another for which he is not responsible, either in law or by contract.

The liability of Aleshire by his contract was conditional. His contract was that he would pay the note, if the maker, on demand at maturity, should fail to pay it, provided the holder of the note should duly notify him of such demand and non-payment. There is no pretense that such notice was given to Aleshire or that by the exercise of reasonable diligence, it could not have been given. The claim is that the giving of such notice to Aleshire's assignee was a reasonable compliance with the conditions of the contract of indorsement, or if not such compliance with conditions as would render Aleshire personally liable, it would at least bind the property in the hands of the assignee.

The last proposition has been sufficiently considered. It may however be well to add that the power of the assignee was confined to the care of the assets placed in his hands, and the payment of debts already existing, conditionally or unconditionally, against the property or the assignor, but did not include the right to create new and additional debts, either against the assignor or the property which had been placed in his hands other than expenses of the administration.

I admit that the contract of indorsement must be fairly and reasonably interpreted. A literal compliance with its terms will be excused where it would be unreasonable to exact it. For instance, if the indorser be dead at the time notice of dishonor should be served, notice to his personal representative is sufficient. Notice to the general agent of the indorser is sufficient. If under the circumstances notice be impossible or impracticable, it is excuse altogether. In such cases the liability of the indorser becomes fixed.

But we can see no ground upon which the personal liability of the indorser should be fixed by notice to his assignee in insolvency. The statute makes no such provision. Such notice is not expressly or impliedly authorized by the deed of assignment. If the assignee can be considered the agent of the assignor for any purpose, his power is limited, not general. By the administration of the assignment the assignor is not discharged from any of his unpaid debts. The service of notice on the indorser is not rendered impracticable by the assignment, nor is the service of notice thereby waived.

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If therefore the personal liability of the indorser, who is also assignor in insolvency, be desired by the holder of the indorsed paper, the notice of its dishonor by the makers should be given to the indorser, and not to his assignee in insolvency. If the liability of the indorser be thus fixed, it appears to me, as a necessary result, that the claim may be proved against the assignee, whether he has or has not received notice of the dishonor. The claim being thus fixed as a debt against the assignor, the holder becomes a beneficiary under the express terms of the assignment.

If the doctrine last stated needed any authority to sustain it, it is abundantly supported by the reasoning in the recent case of *Ex parte Baker* and *In re Bellman*, 4 Ch. D. 795.

If it be true, and it certainly is, that the claim, if notice of dishonor be given to the indorser, can be proved against the assignee, although he has not been notified of its dishonor, it follows that notice to the assignee must be regarded as given solely for the purpose of fixing the liability of the indorser by his contract of indorsement. Such notice however as we have seen is not a literal performance of the condition in the contract. Is it a reasonable performance of such condition? The reason that underlies the necessity for the notice is that the indorser, when liability is thus fixed, may protect himself against loss by compelling the makers, for whom he is thus placed in the relation of surety, to discharge the indebtedness. Notice to the assignee does not place the indorser in this condition. We have already stated that the assignee cannot be considered as the general agent of the assignor. In the discharge of his duty he acts as representative of the beneficiaries. He is under no obligation to give notice of the dishonor to his assignor. Hence if notice to the assignee were held to be sufficient to charge the indorser, he would be deprived of the means of indemnity and protection which notice of the dishonor is intended to afford.

It is no answer to this proposition to say that the assignee has power to protect the trust estate by compelling the makers to discharge the debt. The same power and duty would devolve on the assignee if the notice of dishonor were served on the indorser. But the true solution of the question lies in the fact that the liability fixed by demand and notice of non-payment is a personal liability. Such a liability is based on the contract of indorsement, and can attach only to the indorser, and not to his assignee. If the assigned

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property be charged with the debt, it can only be by first charging the assignor with personal liability, whereby the property, in course of the administration of the trust, becomes liable for the payment of the debt. Demand and notice of dishonor is not a means of creating a lien on the property of the indorser, whether assigned or not assigned.

It is clear therefore that the indorser must be charged, and notice must be served upon him or his agent, or his personal representative, or be excused altogether. In this case neither alternative has been complied with.

But little aid in the solution of this question has been derived from books. The writers of text-books have generally recommended the giving of notice of dishonor to both the assignor and assignee. We think such double notice to be unnecessary. It has never been said by court or text-writer that notice to the indorser is not sufficient. But that such notice is sufficient to bind the assignee in bankruptcy or insolvency in the administration of his trust has frequently been said and adjudged. That notice to the assignee is sufficient has been adjudged, as far as we are informed, only in a single reported case, *Callahan v. Bank of Kentucky*, by the Court of Appeals of Kentucky, 6 Ky. Law Rep. 188. While we entertain the highest respect for that court, we are not satisfied with the conclusion or logic of that case. We think that case should not be followed, especially in a State where an assignment does not absolve a debtor from his personal liability on his debts, or any portion thereof, which remains unprovided for or unpaid by the assignee.

My attention has been called to *Ex parte Tremont National Bank*, 2 Lowell Dec. 409, in which it was held by the District Court of the United States for the district of Massachusetts, under the bankrupt act, that a bankrupt, after adjudication in bankruptcy and before the appointment of an assignee, may waive demand and notice as to a note indorsed by him and maturing during that interval, and that such waiver binds the assignee afterward appointed. That case is relied on as militating against the doctrine above announced. If any thing contained in the opinion in that case can be so construed, it is by mere implication. Certainly the case itself did not require such holding, as the decision arrived at is perfectly consistent with the conclusion announced in this case.

And again the difference between the bankrupt law, which ab-

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solves the bankrupt from all future liability on debts provable against his estate, and our insolvent laws, might possibly require different conclusions in respect to the effect to be given to notice served on the assignee. As to this however I express no opinion.

Judgment reversed.

JOHNSON and OWEN, JJ., dissenting.

NOTE BY THE REPORTER.—The opinions of the text-book writers seem generally opposed to this decision.

In *Parsons on Notes and Bills*, 499, 500, it is said: "If a person entitled to notice be bankrupt, notice should be given to him if his assignee is not yet appointed." He leaves the question in doubt however by saying the safest course is to give notice to both, but he adds that: "If the insolvent has absconded, notice should be given to the assignees, and if they are not appointed, a delay until an appointment is made would not discharge any one, and although notice may be given to any one holding or representing the estate, we should think it better to notify the assignees when appointed."

Story on Bills, sections 805 and 839, says: "If the party entitled to notice has become bankrupt and assignees have been chosen or appointed, notice to the assignees is proper, and will be sufficient."

Chitty on Bills, 228, says: "If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and after such choice to them."

Byles on Bills, *289, leaves the matter in doubt by saying: "If the assignees are appointed, perhaps notice should be given to them."

Daniel's Negotiable Instruments, section 1002, says it is best to give notice to both, but if no assignee is appointed, notice to the bankrupt is sufficient, and perhaps it might be sufficient if one had been appointed.

In *Ex parte Tremont National Bank*, 2 Low, Dec, 409, the question arose as to the power of a bankrupt after adjudication and before the appointment of the assignee to waive demand and notice on commercial paper. It was there held, upon the authority of *Lord Eldon*, 19 Vesey, 261, that until an assignee was appointed, the bankrupt is the trustee of his estate, and Judge *Lowell* quotes from *Robson on Bankruptcy*, 178, that notice should be given to the trustee or assignee.

The question was determined by the Court of Appeals of Kentucky, in *Callahan v. Bank of Kentucky*, 6 Ky. Law Rep. 188. All the authorities are there reviewed, and it was held that notice to the assignee was sufficient. It was there said that where the insolvent chooses his own assignee, the latter is charged with the duty of acting as his trustee or agent to settle up the estate, and being thus clothed with full power to act as his general representative, notice given to him is notice given to his general agent, and is valid as to the principal.

In *Fassin v. Hubbard*, 55 N. Y. 465, one Burke was appointed the agent of a firm in liquidation to wind up its affairs. This agent was notified of the dishonor of commercial paper of which they were indorsers. The court held

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notice to him as such agent was sufficient to charge them, and add: "He was the general agent for liquidating the affairs of the firm, and the notice related to those affairs."

In *Bank of Auburn v. Putnam*, 8 Keyes, 848, it was held, notice to a general agent was notice to the indorser, whose agent he was.

In *Donnell v. Lewis County Savings Bank*, 30 Mo. 165, it was held that notice to the indorser was sufficient, where he had made a general assignment in another State, of which the payee was ignorant.

GANO V. FISK.

(43 Ohio St. 462.)

Gift — causa mortis — notes.

G. was an old man having daughters by a first wife, and a son by her with whom he boarded; he owned a farm and stock thereon, but most of his estate consisted of promissory notes; before his last sickness he had expressed a desire "that his children should have his notes and his son should have his farm;" on the day of his death, in the presence of a daughter's husband, herself and a sister, G. said to the daughter: "My notes are in a little box on the bureau there; I want you to take them and divide them equally among you children." He told her to get the key to the box, and she got the key and tried it in the box, and gave the key to her husband for safe-keeping. After his death, intestate, she took the box, but did not divide the notes, but returned them to the administrator, and they were appraised and held as part of the estate. *Held*, that there was no sufficient delivery to constitute a gift *causa mortis*.*

ACTION for notes and their proceeds. The head-note states the case. The plaintiff had judgment below.

S. C. Kingman and T. E. Duncan, for plaintiff in error.

Andrews & Allison and James Olds, for defendant in error.

FOLLETT, J. These promissory notes are claimed as gifts *causa mortis*.

The principles and laws that govern the rights of ownership and control of property are fundamental to man's enjoyment and civilization. The rules and laws for the transfer or transmission of such rights are carefully guarded, and should be strictly enforced.

* See *Curtis v. Portland Sav. Bk.* (77 Me. 151), 52 Am. Rep. 750.

Gifts *causa mortis* are not favored, and such gifts must be clearly proved. The civil law sought to prevent fraud in such gifts, and required their execution in the presence of five witnesses, to render them valid. Great strictness and clear proof to establish such gifts have been required by the English courts, and litigation as to them has been extensive and hostile.

Such a gift can be upheld only when the intention of the donor is definite and certain, and such intent is expressed as to a proper matter of such gift, and such gift is executed.

Whatever property Samuel Gano had at his death could be disposed of only by his will or by the law. *Needles v. Needles*, 7 Ohio St. 433; *Crane v. Doty*, 1 Ohio St. 283.

The court held in *Phipps v. Hope*, 16 Ohio St. 586, that "directions by an owner in respect to a disposition of his property, to take effect after his death, and different from such as the law would prescribe in the case of intestacy, are of no validity unless made through the medium of a last will and testament."

Directions alone are not sufficient. A gift *causa mortis* has the nature of a legacy. It is a gift in prospect of death, and it may be revoked before death, and it is not complete during the donor's life, but takes effect only upon his death. Such a gift is liable to the debts of the donor. Such is the holding of both English and American cases.

In *Lawson v. Lawson*, 1 P. Wms. 441, a husband upon his death bed gave to his wife a purse of 100 guineas and bid her apply it to her own use, and the court held, "This is a *donatio causa mortis* and a good legacy to the wife, and shall not go to the executors or administrators of the husband if there is sufficient to pay his debts." But we need not cite other decisions, as the statute 8 and 9 Vict., ch. 76, declares that such a gift is a legacy within the meaning of the acts in England and Ireland, which impose duties on legacies.

"A *donatio causa mortis* is of the nature of a legacy. *Jones v. Brown*, 34 N. H. 439.

"Gifts *causa mortis* are of a mixed nature, resembling gifts *inter vivos*, in the essential requisite of delivery, and resembling legacies in being subject to the debts of the deceased, and in being ambulatory or revocable, and contingent on death." *Bloomer v. Bloomer*, 2 Brad. 340. Also see *Rhodes v. Childs*, 64 Penn. St. 18; *Rep. Leg.* 2; 3 Redf. Wills, § 42, and cases cited.

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Look at the facts in this case as found by the court. Decedent left a widow, three girls who were children of a first wife, and a boy the son of his widow. These promissory notes constituted the larger part of his estate. Before his last sickness he had expressed a desire that his son Frank should have his farm, and that "his children aforesaid" should have the notes. Do the words "his children aforesaid" include only the "children of his first wife," or do they include his son Frank? Give the words either meaning, and his expressed desire was not carried out, and is not asked to be carried out.

At his death bed, though boarding with his son Frank, there were present only two of his children; the married daughters of his first wife, and I. J. Fisk, the husband of one of these children; and on the morning of the day he died, in the presence of this husband, and Caroline Pearson, her sister, "he called Mrs. Fisk, and said to her, my notes are in a little box on the bureau there; I want you to take them and divide them equally among you children." There was but one person present who is not a beneficiary of this claimed gift, and he is the husband of the chief actor, who got the key and tried it in the box, and "for fear she might lose it," gave the key to this husband. It does not appear that a word was said to the other daughter, or that he told her to take any thing.

We will not stop to consider whether this husband should testify in such a case, or what effect should be given to his statements.

The father died the same evening, on Friday, and was buried the next day, on Saturday.

"After her father's death, Mrs. Fisk took the box containing the notes home with her." What else was in the box we do not know. The notes were never divided. On the next Monday, I. J. Fisk was appointed administrator, and took these notes, and they were appraised as part of the estate, and have ever been so held.

The validity of each gift, *causa mortis*, depends upon the facts of each case.

"The gift of the maker's own note is the delivery of a promise only, and not of the thing promised; and upon the death of the maker, leaving the promise unfulfilled, the gift fails." *Starr v. Starr*, 9 Ohio St. 74.

"The drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was

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drawn. *Held*, that until the check was either paid or accepted, the gift was incomplete, and that in the absence of such payment or acceptance, the death of the drawer operated, as against the payee, as a revocation of the check." *Simmons v. Savings Society*, 31 Ohio St. 457; s. c., 27 Am. Rep. 521.

In each above case there was something more to be done, either by the donor or by the donee, before the gift could be enforced.

"To constitute a valid gift the transfer must be consummated and not remain incomplete, or rest in mere intention; and this is so whether the gift is by delivery only, or by the creation of a trust in a third person, or in the donor; enough must be done to pass the title." *Martin v. Funk*, 75 N. Y. 134; s. c., 31 Am. Rep. 446.

The words, found by the court to constitute the gift of the notes, were, "I want you to take them and divide them equally among you children." Suppose he thus intended the four children, what was Mrs. Fisk to do? Was she to collect the money due on the notes, and then divide the proceeds equally among them? If so, the gift was not complete, and no title passed. His death revoked the gift.

Or was Mrs. Fisk to divide the notes into four equal amounts in value, and then deliver to each child a definite parcel of these thirty-eight notes? This was never done, and these notes, it seems, could not be so divided. So there never was a separation of the notes made so as to vest in each donee an ownership in particular notes.

But had the notes been so that they could be equally divided, how could the doubtful or worthless notes be disposed of? Who would take them? Or should she disregard them? Gano did not hand the notes to Mrs. Fisk, and say, "I give these notes to you four children;" neither did he say, "I give these notes to you children equally, one-fourth part to each." Something more must be done to complete the gift.

But the delivery must be as perfect and complete as the nature of the thing will admit of. Pars. Cont. 326, and cases cited; 3 Wait. Act. & Def. 505.

"To establish a gift, *causa mortis*, the common law requires clear and unmistakable proof, not only of an intention to give, but of an actual gift perfected by as complete a delivery as the nature of the property will admit of." *Hatch v. Atkinson*, 56 Me. 324. See also 3 Redf. Wills, 348 (20).

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The facts found by the District Court show there was no delivery of the alleged gifts; and the court erred in holding, upon such finding of facts, that there was such a delivery of the promissory notes as constitutes a good gift, *causa mortis*.

We need not examine how far the courts will protect a widow from an intended fraud upon her rights as such widow, neither to what extent a father may disinherit his children by gifts made during the last few hours or days of his life. Our laws relating to written and nuncupative wills, and our laws of descent, should not be defeated by such gifts, unless in a very clear case.

Cases of donations, *causa mortis*, are exceptions not to be extended by way of analogy. *Headley v. Kirby*, 18 Penn. St. 326; also cited in 1 Am. Law Reg. 25.

This attempt to make a will for the father, and to dispose of his property, "different from such as the law would prescribe in case of intestacy," is "of no validity."

Judgment reversed and cause remanded.

MILLER V. ANDERSON.

(43 Ohio St. 473.)

Bastard — Liability of natural father for support after mother's marriage.

The natural father of an illegitimate child cannot be held for its support if the mother, during the pregnancy, marries another man who has full knowledge of her pregnancy. (*See note, p. 828.*)

BASTARDY proceedings. The head-note states the point.

Andrews & Erskine and John M. Cook, for plaintiff in error.

Trainor & Son, for defendant in error.

ATHERTON, J. The question presented by this record is, whether under the state of facts disclosed Anderson can be held as the putative father of this child, and be required to contribute to its support, or whether Riddlemoser, having married the complainant, with full knowledge of her condition, is alone liable for its support.

The Revised Statutes provide: "Sec. 5614. When an unmar

ried woman, who has been delivered of or is pregnant with a bastard child, makes complaint thereof in writing, under oath, before any justice of the peace, charging a person with being the father of such child, the justice shall thereupon issue his warrant," etc.

Can the child in this case, in legal contemplation, be regarded as a bastard?

Blackstone, under the inquiry, "Who are bastards?" says: "A bastard, by our English laws, is one that is not only begotten, but born out of lawful matrimony." 1 Bl. Com. 454. And Kent also defines illegitimate children or bastards as "being persons who are begotten and born out of lawful wedlock." 2 Kent Com. 208.

In Best on Presumptions, in discussing presumptions of legitimacy, the author says: "One of the strongest illustrations of this principle (although resting in some degree on grounds of public policy) is the presumption in favor of the legitimacy of children" * * * "Thus it is said to be a presumption, *et de jure*, that a child born during wedlock, and of which the mother was visibly pregnant at the time of marriage, must be taken to be the offspring of the husband." Section 58.

The Supreme Court of Iowa, in the case of *State v. Romaine*, 58 Iowa, 48, lays down the rule that "if a woman be pregnant at the time of the marriage, and if the pregnancy be known to the husband, he should be conclusively presumed to be the father."

In *State v. Herman*, 13 Ired. (Law) 502, the Supreme Court of North Carolina held that "a child born within a month or a day after marriage, is legitimate by presumption of law, and where the mother was visibly pregnant at the marriage, it is a presumption *juris et de jure* that the child was the offspring of the husband."

And in *Rhyn v. Hoffman*, 6 Jones Eq. N. C. 335, the court quote with approval a quotation from 1 Roll's Abr. 358, and 2 Bac. Abr. 84, as follows: "So if the woman be big with child by A., marry B., and then the child is born, it is the legitimate child of B."

It has been held in a large number of cases, both in England and America, that the wife is not a competent witness to prove non-access of the husband, whether the child was begotten before or after marriage.

In *Rex v. Reading*, Hardwicke, 79, Lord HARDWICKE said, "it must be of very dangerous consequence, to lay it down in general, that a wife should be sufficient sole evidence to bastardize her child and to discharge her husband of the burden of its maintenance."

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Similar language is used by Lord ELLENBOROUGH in *The King v. Luffe*, 8 East, 193, and in various English authorities.

The reason for this rule is stated in *Tioga County v. South Creek Township*, 75 Penn. St. 433, in the following language: "That issue born in wedlock, though begotten before, is presumptively legitimate, is an axiom of law so well established that to cite authorities in support of it would be mere waste of time. So the rule that the parents will not be permitted to prove non-access for the purpose of bastardizing such issue is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact that it reveals immoral conduct upon the part of the parents, as because the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence the rule of law that forbids it."

This doctrine is recognized in *Parker v. Way*, 15 N. H. 45; *Davis v. Houston*, 2 Yeates, 289; *Page v. Dennison*, 1 Grant Cases, 377; s. c., 29 Penn. St. 420, in which case the court in addition hold that: "Whether the child is begotten in or out of wedlock, if marriage precede the birth the presumption of paternity is the same, and it can only be bastardized by proof of non-access. The wife is not a competent witness to prove non-access on the part of her husband, and that her child begotten before, but born during wedlock, was not begotten by him."

On the same point see *State v. Wilson*, 10 Ired. 131, and *State v. Herman*, *supra*, in both of which cases the pregnancy preceded the marriage.

The cases are collected on this point in 1 Phil. Ev. 87, and note, and the reason of the rule stated in the text, as follows: "This rule is established, independently of any possible motive of interest in the particular case, upon principles of public policy and decency."

It will be observed that after the complainant in the case had submitted her evidence and rested, the defendant moved to arrest the case from the jury and dismiss the complaint upon the ground that the testimony offered made no case against defendant, and if no competent testimony of non-access had been offered the motion was well taken. But the court overruled the motion and defendant excepted. Whether under our statute relating to evidence the

complainant was incompetent to prove non-access, we do not feel compelled to decide, for the case can be determined without it.

The question yet remains, whether if Riddlemoser, by contracting marriage with the complainant, and putting himself in *loco parentis*, and assuming the place of a parent and his duties and obligations, has legitimated the child or not, or if by that act the child in legal contemplation is the child of Riddlemoser, it is not a bastard and the defendant cannot be held under our bastardy act.

No case in point has been adjudicated in Ohio, so far as our reports show.

This court in *Roth v. Jacobs*, 21 Ohio St. 646, held that after a woman, pregnant with child, had filed her sworn complaint in bastardy charging the defendant with the paternity of her unborn child, her subsequent marriage with another did not necessarily work a discontinuance of the action, for the reason, as the court say, that it cannot be conclusively presumed that the man who marries a pregnant woman is the father of the child. He may not have known that she was in that condition when he married her and therefore, if born alive, it may be a bastard. There was no suggestion in that case of what the result would have been had the marriage been contracted by a man with full knowledge of the pregnancy.

In *Haworth v. Gill*, 30 Ohio St. 627, it was attempted to make a defendant liable under the bastardy act by showing that while complainant was the wife of another he became the father of her unborn child.

After the child was born the complainant procured a divorce from her former husband, and the court held that to make defendant liable the delivery and pregnancy as well as the making of the complainant, must be predicated of an unmarried woman. The court in that case suggestively say: "But no complaint could have been made in this case, either during pregnancy or for eight months after delivery. The child was during all this time the innocent and honest child of a married woman; and in any proceeding under this act, would have been conclusively presumed to be legitimate. The subsequent divorce of the mother may have changed her status, but not that of her child * * * It dissolved the marital relation, but did not bastardize the issue begotten and born during its continuance."

So we say here: By the act of Riddlemoser in marrying the complainant he most solemnly and effectively acknowledged the unborn child to be his own. He knew her condition and every honorable

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sentiment would require him to marry her if the child was his and to avoid her if it was not. He chose to marry her and thus legitimate her issue and make it his own. The act would have made the child heir to his estate and being made so by his act, can the inhuman mother, by her uncorroborated testimony, make it a bastard? We have a statute, Rev. Stats., § 4175, providing that when a man has children by a woman and afterward intermarries with her, such issue if acknowledged by him as his children are deemed legitimate, and will then have all the rights of heirship and inheritance of children born in wedlock.

Suppose a woman has children believed by a man, who afterward marries her, to be his; that he contracts marriage with the mother, and fully acknowledges the children to be his own, can they be bastardized by proving somebody else begat them, and especially can their mother bastardize them and take from them the rights they acquired by the marriage of their mother with the man that acknowledged them to be his own?

A case precisely in point with the one under consideration has recently been determined by the Supreme Court of Iowa. *State v. Shoemaker*, 62 Iowa, 333; s. c., 49 Am. Rep. 146.

In that case a child was begotten by the defendant, and during the pregnancy of the complainant and two months before the birth of the child, she was married to another man who was fully informed that complainant was *enceinte*, and her condition apparent from her appearance. Upon these facts the court held that the defendant could not be made liable under the bastard act. The reasoning of the court was in substance as follows, and this court adopts it as its own.

If another man, not the father of the unborn child, elects to stand in *loco parentis* to the child, the law will esteem such man as the father; that one who marries a woman that he knows to be *enceinte* is regarded in law as adopting the child into the family at its birth; that he could not expect the mother to discard it or abandon it at its birth, or refuse it nurture or maintenance and that the child so receiving nurture and support, must necessarily become of the family of the wife, which would also be of the family of the husband; that this understanding must necessarily enter into the marriage contract of the husband and wife, and when this relation is established the law raises a conclusive presumption that the husband is the father of such child.

As recognized in that case, we do not affirm this rule holds good on questions of heirship. There the rights of others are involved outside of the husband and the alleged bastard child. But in such a case as this the rights and liabilities of husband and child alone are involved.

The court say: "A husband who in the manner we have indicated has put himself in *loco parentis* of a bastard child of his wife, ought not to be permitted to disturb the family relation, and bring scandal upon his wife and her child, by establishing its bastardy, after he has condoned the wife's offense by taking her in marriage."

And this rule, as announced, is established upon obvious principles of public policy and decency. This child was born in 1865. The husband had prior thereto condoned the wife's offense, and by taking her in marriage, with full knowledge of her condition, adopted her child on its birth into his family, and even if he was not its natural father, consented to stand in law as such, with all the rights and responsibilities of a father in fact. The child became entitled to his protection and support and owed him its duty and service and was legitimated and legitimate, and the "honest child of wedlock." So it remained until sixteen years of age. Public policy, public decency, and every consideration which concerns the peace and well-being of the family, cries out against the unnatural effort of the mother to bastardize her issue.

Our conclusion is that the judgment of the District Court should be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Hardy v. Atterton*, 7 Q. B. Div. 264, it was held that an order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother, although the husband is able to maintain the child. HUDDLESTON, J., said: "It is clear that the legislature had its attention called to the matter, and did not intend the liability of the father to cease on the marriage of the mother. It is worthy of remark also, that although various limitations are introduced into the order of the justices, there is no limitation with reference to the marriage of the mother. Under these circumstances, I have no doubt that the order is in force, although the mother marries again, and her husband has means to keep the child."

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(43 Ohio St. 537.)

Contract — subscription — revocation by death.

A written offer to subscribe to the capital stock of a railroad company, provided it shall build along a certain route, is revoked by the death of the party offering before delivery to and acceptance by the company.

ACTION on a subscription. The opinion states the case. The plaintiff had judgment below.

Daniel Peck and Wm. P. Hayes, for plaintiff in error.

J. W. Tyler and Alexander & McDonald, for defendant in error.

OWEN, J. As we rest the disposition of this case upon the single question whether the facts found by the trial court were sufficient to authorize the judgment rendered by it, none of the other numerous questions which the record presents are discussed in this opinion. By the findings of fact it will be seen that the railroad company proposed to extend its line of road over a designated route to the Ohio river, opposite the city of Wheeling, provided that subscriptions to its capital stock would be made by persons residing along the proposed line and near the southern terminus thereof, aggregating the sum of \$250,000. That Henry Wallace, with other citizens of Wheeling, knowing of such proposition and being desirous to promote such extension, held a public meeting and appointed a committee to solicit subscriptions to the capital stock of the company. That Wallace thereafter, at the solicitation of this committee, signed the two papers declared upon, each in a book furnished by the committee. That other persons had previously signed these subscriptions. That upon his signing these writings, respectively, he delivered them to the committee. That he soon thereafter died — these books remaining in the hands of the committee.

That after his death, and when all the subscriptions to stock had been procured along the proposed line and near the southern terminus that the committee was able to secure, and which aggregated less than the proposed \$250,000, the evidence of all these subscriptions were, at the instance of the surviving subscribers, tendered to

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and accepted by the company, which then agreed to extend its line of road as had been before proposed. That at the time of such acceptance and agreement the officers of the company had no notice or information of the death of Henry Wallace. That before July 1, 1877, the company commenced the construction of the proposed extension, and did, within a reasonable time thereafter, fully complete it.

Did the estate of Henry Wallace become bound by these subscriptions upon their delivery to and acceptance by the railroad company?

The proposition of the company was made at large, and not to these subscribers more than to any others, who should first subscribe the required \$250,000. It does not even appear that the company knew, at any time prior to Wallace's death, of the existence of this committee, or that these subscriptions were being procured. The company was not bound to accept Wallace's subscription at any time during his life. It had made no agreement with Wallace or with his co-subscribers. So far as the findings show, the company had no knowledge that Wallace had subscribed, and nothing was done by it on the faith of his subscription prior to his death. Suppose that another committee, having heard of the proposition of the company, had succeeded in procuring the requisite \$250,000 in subscriptions, tendered it to the company, which had accepted it, and agreed to perform its conditions before this committee had tendered its subscriptions, would it be contended that the company would have been under any obligation to accept them? If any thing is claimed from the proposition of the company and its acceptance by the subscribers, it is a sufficient answer to say that the conditions of the proposition have never to this day been performed; that after the death of Wallace his surviving subscribers, finding that they had failed to raise the amount which the company had demanded in its proposition, proposed new terms to the company, tendered a less amount in subscriptions which was accepted; and thereupon, for the first time in the history of these transactions, the company agreed, on its part, to perform the conditions upon which the subscriptions were made. And this was a new contract, to which Wallace was never a consenting party. Thus we see that the negotiations which actually led to the creation of mutual and binding obligations between the company and the surviving subscribers transpired after the death of Wallace. It is maintained however that various persons subscribed after Wallace and on the

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faith of his subscription. This does not appear from the findings of fact. For all that is shown by this finding, Wallace may have been the very last subscriber. If these surviving subscribers consented to the delivery to the company of a dead man's subscription, they are in no situation to complain. It is also maintained that the company built the road on the faith of the subscription of Wallace and his co-subscribers. It appears that at the time of the company's acceptance and agreement, its officers had no knowledge of Wallace's death; but so far as the record shows to the contrary, it began the work with full knowledge that this committee had tendered it a dead man's paper. Counsel for the company maintain that "the committee so often referred to, which took these subscriptions, was rather the agent of the railway company than of Wallace, * * * the company having ratified their action." If this view is tenable, then by a familiar rule, notice to this committee was notice to the company of the death of Wallace; for it will be observed that there is no finding that the company had no notice of Wallace's death, but that its officers had none. Ordinarily notice is carried to a corporation through its officers, but not necessarily so. While its officers are in a sense agents, its agents are not necessarily officers. Hence if this committee was the agent of the company, by reason of the ratification of its acts by the latter, notice to the committee was notice to the company; and it would be incumbent upon the latter to show that its agent had no notice of the death of Wallace. This is not shown. We do not deem it necessary however to rest our determination upon this view.

Until some action is taken on the basis of a subscription to a benevolent or other enterprise, it may be revoked. The promise in such case stands as a mere offer, and may by necessary implication be revoked at any time before it is acted on. It is the expending of money, etc., or incurring of legal liability on the faith of a promise which gives the right of action, and without which there is no right of action. Until action upon it there is no mutuality, and being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death (or insanity) of the prisoner, before the offer is acted upon, is a revocation of the offer. *Pratt v. Trustees*, 93 Ill. 475; s. c., 34 Am. Rep. 187. See also *Beach v. Church*, 96 Ill. 179; 1 Whart. Cont., §§ 12, 528; *Pollock Cont.* 20; *Dickinson v. Dodds*, 2 Ch. Div. 475; *Taylor v. Mer. Fire Ins. Co.*, 9 How. 390; 1 Redf. Railw. *203.

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Here was an unaccepted conditional subscription by Wallace to the capital stock of the company. Indeed, looking to its substance and plain intent rather than its form, we find it to be no more than an offer to subscribe to stock upon certain named conditions. It was not a subscription to stock in the ordinary sense of that term. The company was not a party to it, and was under no obligation to accept it at any time during the life of Wallace. It was at best an unaccepted proposal. Before its acceptance, and indeed (so far as it is made to appear to us) before the party to whom it was made had notice of it, the proposer died. It was a proposal capable of revocation at any time before acceptance, and death worked its complete revocation. There was error in rendering judgment upon it against the defendants below, for which error the

Judgments below are reversed.

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(48 Ohio St. 548.)

Election — registration — constitutionality.

A statute relating to elections required registration as a pre-requisite to the right of voting; allowed voters only seven days within the year in which to register and correct the registration; made no provision for registration thereafter, nor for any excuse for not registering in time, nor any means whereby absentees could be subsequently registered. *Held*, unreasonable and invalid. (See note, p. 848.)

HABEAS CORPUS. Complaint against an election judge for receiving the vote of an unregistered person. The respondent had judgment below.

Follett, Hyman & Kelley, and Jordan, Jordan & Williams, for plaintiff.

E. W. Kittredge, Boynton & Hale, and F. F. Dickman, for defendant.

ATHERTON, J. The ground upon which the return is claimed to be insufficient is that the act passed May 4, 1855 (82 Ohio L. 232), entitled "an act to provide for ascertaining the citizens who

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shall be entitled to vote in cities of the first and second grades of the first class, by amending and supplementing section 2926 of the Revised Statutes," is unconstitutional and void.

It is claimed that the provisions of this act are in violation of section 1, article 5 of the Constitution, which reads:

"Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State one year next preceding the election, and of the county, township or ward in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

In Pennsylvania the Supreme Court held that a registry law was unconstitutional on the ground that it impaired the free exercise of the right of suffrage as conferred by the Constitution, and that "no constitutional qualification of an elector can in the least be abridged, added to or altered by legislation, or the pretense of legislation." *Page v. Allen*, 58 Penn. St. 338, 347.

And the Supreme Court of Wisconsin held: "That part of section 8, chapter 235, Laws of 1879, which provides that no vote shall be received at any general election unless the name of the person offering to vote be on the register completed by the board of registry, as previously provided in said act, excepting only the case of persons who may have become qualified voters before such election, but after the completion of such register—is in violation of section 1, article 3 of the State Constitution, which defines the qualifications of electors; and that provision being an essential part of the act, without which it cannot be supposed that the statute would have been enacted, the whole act is invalid." *Dells v. Kennedy*, 49 Wis. 555; s. c., 35 Am. Rep. 786.

In these States, like ours, there was no constitutional provision requiring or expressly authorizing registration.

Registration laws are in terms either authorized or required to be enacted by the Constitutions of the following States: Alabama, Arkansas, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Rhode Island, South Carolina, Virginia and West Virginia. The Constitutions of the following States are silent on the question: California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, Texas and Vermont.

The question here presented is whether, in the absence of constitutional provisions expressly authorizing it, the legislature can by its general grant of legislative power, and for the purpose of "ascertaining the citizens who shall be entitled to vote," enact registration laws.

The leading case upon this subject is admitted on all sides to be *Capen v. Foster*, 12 Pick, 485; s. c., 23 Am. Dec. 632, and as will be seen by the foregoing list, was determined by the court of last resort of a State whose Constitution was silent on the subject of registration.

A statute was enacted establishing the city of Boston, and in section 24 of the act it was provided that prior to every election it should be the duty of the city officers of that city to make a registration of voters, and that no person should be entitled to vote whose name was not borne on the list. The Supreme Court held that the provisions of that act were not to be regarded as prescribing a qualification in addition to those which by the Constitution entitles a citizen to vote, but only a reasonable regulation of the mode of exercising the right of voting, which it was competent for the legislature to make.

So, in Wisconsin, where the Constitution was also silent on the subject of registration laws, the Supreme Court held that although the Constitution, section, 1, article 3, prescribed the qualifications of electors, and that a statute could not impair the right of those possessing them, they might require proof thereof, consistent with the right itself, and that the registry law of that State was valid so far as it provided for a register of qualified electors to be made in the manner therein prescribed, and constituted such register one mode of proof of the elector's right, and so far also as it requires the elector whose name is not upon such register to make other reasonable proof of his right to the inspectors of the election at the time of offering his vote. *State v. Baker*, 38 Wis. 71.

So, in Iowa, it was held that while the right to vote by one possessing the qualifications of an elector, as prescribed by the State Constitution, cannot either be destroyed or impaired by the legislature, yet that the legislature may regulate the exercise of the right by enacting provisions for determining the age, length of residence, etc., of persons offering to vote, and that the registry law of that State providing for the registration of voters was not in conflict with the Constitution, prescribing the qualification of electors. *Edmonds v. Banbury*, 28 Iowa, 267; s. c., 4 Am. Rep. 177.

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This court has adopted the doctrine laid down in the case of *Capen v. Foster, supra*. *Monroe v. Collins*, 17 Ohio St. 666, 687.

Other decisions of like character might be cited; and we think the current of authority is opposed to the decisions in *Page v. Allen*, and *Dells v. Kennedy*, in so far as they may be understood to pronounce against the constitutionality of all registration laws, and that it is competent for the legislature, under the general powers of legislation granted to it by the Constitution, to provide for a general registration of voters, and making the fact of registry a condition to the exercise of the right of voting.

The power being conceded, the legislature is supposed to know best the wants of the State in that regard, and it is not for the courts to question the wisdom of making such enactments.

Registration is one of the modes in which purity in elections may be attained, and every honest and qualified voter has an interest in securing the integrity of the ballot and excluding the ballots of the dishonest and unqualified.

Every honest voter is as much injured by the reception of a fraudulent vote as by the exclusion of his own, and it makes but little difference to him whether his vote is wrongfully excluded or completely neutralized by the ballot of a person unqualified. Among the safeguards that we deem most efficacious to prevent fraud, insure integrity at the polls, and enable the honest and qualified elector to exert his just influence, and control the result, is a wise system of registration; and we are satisfied that it is within the constitutional province of the legislature to enact a wise registration law, that without in any way abridging the rights of qualified electors, or adding any unlawful qualifications to the voter, may secure the purity of the election by a registry law, so framed as to be a reasonable regulation of the mode of exercising a constitutional right.

But it is claimed in the case at bar, that admitting the general right to enact a proper registration law, the act under consideration is unconstitutional, because it does not contain reasonable regulations as to the right to vote, but imposes on the voter unreasonable and unnecessary restrictions, and "under the pretense and color of regulating, subverts and injuriously restrains the right itself."

In *Capen v. Foster, supra*, the court, after declaring the enactment of a registry law to be clearly within the just and constitutional limits of legislative power, as a reasonable and uniform

regulation to secure and facilitate the right of voting in a prompt, orderly and convenient manner, yet say that "such a construction would afford no warrant for such an exercise of legislative power as under the pretense and color of regulating should subvert or injuriously restrain the right itself."

The language of this case is adopted by our own court in *Monroe v. Collins, supra*. And on page 685, WELCH, J., delivering the opinion of the court, says: "What the legislature cannot do directly it cannot do by indirection. If it has no power expressly to deny or take away the right, it has none to define it away, or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial. The power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. All reasonable latitude should be allowed to the legislature in the exercise of this power of regulation, and every reasonable intendment in favor of the constitutionality of laws enacted for that purpose should be made by the courts. Such laws are not to be held unconstitutional unless clearly so, and if they will at all bear a construction which makes them consistent with the Constitution, they are to receive that construction, and so to be upheld. The true line between laws which take away or abridge the right of suffrage, and those which may lawfully be enacted to regulate its exercise is laid down by the Supreme Court of Massachusetts in *Capen v. Foster*, 12 Pick. 488. It was there held substantially that laws of the latter description must be reasonable, uniform and impartial, and must be calculated to facilitate and secure, rather than to subvert or impede the exercise of the right to vote."

In *Capen v. Foster*, the court further say, p. 494: "Still, if the provision of this law is such as to afford the voter no opportunity to know seasonably whether his name is on the list or not, and to have it inserted if previously admitted, it would constitute a serious objection to its validity;" and this is the question now presented for our determination.

In discussing the legislative power to regulate the right of voting, the Supreme Court of Pennsylvania say: "The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away or entirely excinded under the name or pretense of regulation, and thus

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would the natural order of things be subverted by making the principal subordinate to the accessory." *Page v. Allen, supra.*

The Supreme Court of Wisconsin, in discussing the registry law of that State assert: "The statute must be so construed as to reconcile all its provisions to the unimpaired, unincumbered right of suffrage at the election." *State, ex rel. Wood, v. Baker, supra.*

Judge BREWER, pronouncing the opinion of the Supreme Court of Kansas, declares: "Doubtless under the pretense of registration and under the pretext of securing evidence of voters' qualifications, laws might be framed which would cast so much burden as really to be imposing additional qualifications. As for instance, suppose the law required all voters in the State to be registered on personal attendance at the State capital, on the first day of the year, for every election taking place during the year. The legislature can not, by in form legislating concerning rules of evidence, in fact overthrow constitutional provisions." *State v. Butts*, 31 Kans. 554.

"No registry law can be sustained which prescribes qualifications of an elector additional to those named in the Constitution, and a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election." *Dells v. Kennedy, supra.*

The above declarations of courts of last resort might be multiplied and indicate the true tests of the constitutionality of statutes relating to the subject of registration where the voter's name must be found on the registry to entitle him to vote.

The legislature has full power to regulate the right to vote, but no constitutional power to restrain or abridge the right, or unnecessarily to impede its free exercise. Under the pretense of regulation the right of suffrage must be left untrammelled by any provisions or even rules of evidence that may injuriously or necessarily impair it, and so the citizen cannot forfeit the right except by his own neglect or by such peculiar accidents as are not attributable to the law itself. So upon this part of the case our conclusion is that the legislature may enact registration laws, but they must be for regulation only, and must not unnecessarily abridge or impair the right of suffrage secured to every elector by the Constitution.

With that view we are to examine the provisions of the act in question, and by the tests given it must stand or fall.

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§ 2926 provides for constructing election precincts.

§ 2926a provides for the appointment of registers.

§ 2926b provides that the registers shall attend at the usual places for holding elections on the third Thursday preceding every general election, from 8 A. M. to 9 P. M., for the purpose of registering voters, and be in attendance there for a like purpose for five successive days.

§ 2926c provides the mode of recording the names.

§ 2926d. How registers are to prepare lists to be posted up.

§ 2926e provides that registers shall be in attendance again on the Wednesday preceding a general election, for the purpose of revising and correcting the lists of voters, adding the names of those who will be entitled to vote at the ensuing election, etc.

It will be seen by the above that there are but seven days in the year when voters can register. These are the six days commencing on the third Thursday preceding the election and the Wednesday preceding the election.

There is no provision for registering at pleasure during the earlier part of the year, and no provision for proving qualifications on election day and voting; and by section 2926e it is declared that "no vote shall be received at any election aforesaid unless the name of the person offering to vote be on the registry," etc.

A voter who is the oldest inhabitant of the ward, and an elector in it for the greater part of his life-time, if from absence however necessary or unintentional, during the seven days, cannot vote if his name is not on the registry. Many absentees may get home to vote, and if they were afforded opportunities during the year might also register, whose right of suffrage must necessarily be lost under the act.

How many mechanics may be absent pursuing their trades during the seven days? A large number of persons will be away on steamboat and other sailing craft and elsewhere earning a support.

A large number of students, a great many of the class usually termed commercial travellers will be away, perhaps planning their trips to be home on election day. A large number of citizens in government employ at Washington and elsewhere will be at their post of duty, and may return to vote, but would hardly have the opportunity to return on a different day to register. Even the members of this court might be unable to register without a decided detriment to the public business, and might be compelled to elect

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between the neglect of important official duties and the loss of suffrage.

Is it a proper regulation of the constitutional right and privilege to say that the right shall be lost unless the elector appears in person during these seven days to register? Is it reasonable to say that all these persons cannot register either before or after the seven days; that they cannot make application for registration in writing upon oath, however well known, but must appear at these arbitrary times in person or lose their rights? As to this large class of persons necessarily absent during the time allotted for registration by the act, is this reasonable regulation, or is it an abridgment and impairment of the right to vote under the guise of regulation?

What the legislature have deemed reasonable regulation elsewhere may be learned by reference to the provisions of the registration laws of other States, especially where these acts have been upheld by the courts.

The Massachusetts registration statute, construed and favorably considered in *Capen v. Foster, supra*, required lists to be made of all electors of each ward qualified to vote and that no person should be entitled to vote whose name was not borne on the list. But it was specially required that the selectmen and assessors should be in session immediately before or on the day of election, so as to give the voter an opportunity to then place his name on the lists if it had been omitted.

The Pennsylvania registry law provided that the assessors, on the first Monday of June, annually, should revise the transcripts received by the county commissioners and strike off those who have died or removed, and add to the list any one entitled. Copies of these lists are to be posted up where the elections are to be held by August 1st, and that an unregistered voter otherwise qualified could on election day make an affidavit of his qualifications, and prove by the affidavit of a qualified voter his residence, and by filing the same could vote at the election. *In re election of McDonough*, 105 Penn. St. 488.

The registry law of Iowa prohibited all persons from voting unless the name appeared upon the registration list, but an elector unregistered but otherwise qualified was permitted to vote upon a proper reason being furnished for not having registered in time and furnishing the affidavit of a registered voter as to his proper resi-

dence. *Edmonds v. Banbury*, 28 Iowa, 267; s. c., 4 Am. Rep. 177.

The registry law of California, though prohibiting a citizen from voting whose name did not appear on the registry, yet permitted a qualified voter, though unregistered, on furnishing proofs of his right, and on the day of election furnishing the board of registration his affidavit setting forth satisfactory reasons why he did not register prior to the thirty days provided by law for registration before the election. *People v. Laine*, 33 Cal. 55; *Webster v. Byrnes*, 34 Cal. 273.

The election law of New York, of 1865, provides that the board of registry shall be in session on the Monday before the election for the purpose of making corrections in and revising the lists of voters, and the act of 1872 provides the registry shall be completed on the Saturday before the election — but neither of these acts has been subjected to judicial tests as to their constitutional validity.

The election law of Illinois prohibits the ballot of unregistered voters, except that it allows such voters, on making proof of their constitutional qualifications on election day, to vote without even requiring proof of a reason for not registering. *Byler v. Asher*, 47 Ill. 101.

The election law of Kansas provides for closing the registry ten days before the election, but permits the voter to register at all times during the year except the last ten days. *State v. Butts*, 31 Kans. 537.

The registry act of Missouri requires the registration of voters to be completed ten days before the election, but the same simply follows the requirement of the Constitution of the State.

In the State of Maine the selectmen are required to make lists of voters, and in towns of over 500 electors the names of legal voters may be added during the three days next preceding the election, and to the hour of five of the secular day prior to the election — and in towns of less population, the selectmen must be in session on the day of election for the purpose aforesaid. Rev. Stats. of Maine, 95.

In New Jersey, in cities of over 100,000 population, no person is permitted to vote unless registered; but his name may be placed on the registration list upon the personal appearances of the elector before the board, or upon the production of his affidavit, or the

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affidavit of some other voter in the precinct, showing him to be a legal voter therein. Revision of Statutes of New Jersey, 364, § 132.

In Maryland, a list is to be made of all legal voters by registration officers, and such lists are thereafter to be corrected, but the lists so made are declared to be the legal and qualified electors and entitled to vote at all future elections, and annual registration is not required. The statute provides however for making additions to and corrections of the lists to within three days of the election. Supplement to Maryland Code, 240 *et seq.*

In Alabama registration is required as a condition to vote, but the assistant registers are required to be present on election day, at the election precinct, to register such voters as may have failed to register on any previous day. Code of Alabama, 23, § 233.

In Mississippi registration is required, and the registration lists are to be kept by the clerk of the Circuit Court: "and any person not on the lists may appear at any time before the clerk and be registered." Code of Mississippi.

The Code of Arkansas provides for registration; but if the voter's name does not appear on the lists he may still vote by taking an oath showing to the satisfaction of the election judges he is a qualified voter. Arkansas Stat. 471, § 2328.

We have been unable to find any case where the registration act has been upheld as constitutional which contained provisions similar to our statute. The necessary absence of a voter, on the seven days provided in the statute for registration, either by sickness, business, imprisonment, or other lawful reason, absolutely forfeits for the time being his constitutional right of suffrage. He cannot anticipate expected absence, and register at an earlier period. He cannot prove his right by his affidavit, or the affidavit of others, and excuse his personal presence at the place of registration. He cannot on the day of election, or within five days prior thereto, by any proof of constitutional qualification, supply the want of former registration.

A foreigner who has taken out his first papers, and made his necessary declaration to become a citizen, and whose rights to full citizenship and the elective franchise will ripen during the five days before or on the day of election, cannot secure registration or the right to vote, because he cannot prove in advance that the action of the court will naturalize him.

We have deeply felt the gravity of the question here presented, and the importance to every citizen of its correct determination, and had hoped to find the provisions of the statute of such a nature that they might be upheld. We believe it an easy task so to frame a registry law, that while protecting the election from fraudulent votes and securing the integrity of the ballot, it will in no practical way impede or injuriously restrain the constitutional right of the voter, but in the language of WELCH, J., in *Monroe v. Collins, supra*, the law must be reasonable, uniform, impartial, and calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote. Believing the act in question unnecessarily, unreasonably, and injuriously to impair and impede the right of suffrage to the voter who is necessarily absent at the time fixed by the act for registration, we are unanimously of opinion that we are compelled to declare it to be subversive of constitutional rights, and therefore void.

It has been suggested that while the act may be unconstitutional and void as to the voter necessarily absent, it might be upheld generally and as to all other classes of voters.

That question we think however has been determined otherwise by this court.

It has been held that an ordinance of a municipal corporation prohibiting under a penalty the opening of a store or shop for business on Sunday, without exempting persons who conscientiously observe the seventh day of the week, was opposed to the policy of the State law and void, and that a person may avoid it without showing he belonged to the excepted class. *City of Canton v. Nist*, 9 Ohio St. 439; *Thompson v. Mt. Vernon*, 11 Ohio St. 688.

“Although a statute may be unconstitutional in part and constitutional in part, yet where only one object is aimed at, and the same is unconstitutional, and all the provisions are contributory to it, and would not have been enacted but for the main object, the whole statute is void. *Darby v. City of Wilmington*, 76 N. C. 133; *State v. Sinks*, 42 Ohio St. 345; *State v. Perry County*, 5 Ohio St. 497.

This act is therefore unconstitutional and void as to all classes.

It has been strenuously and ably argued that the act in question relating, as it does, to the regulation of the right of the citizen to vote, is of a general nature, and must therefore under the Constitution have a uniform operation throughout the State, under that

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clause requiring all acts of a general nature to have such uniform operation.

But the conclusions we have arrived at are conclusive of the case, and upon this and other questions raised in the argument we prefer to express no opinion now.

The petitioner is ordered to be discharged from custody and to recover his costs.

Judgment accordingly.

NOTE BY THE REPORTER.—In *White v. County Com'rs of Multnomah Co.*, Oregon Supreme Court, March 30, 1886, it was held that under the Oregon Constitution, which prescribes the qualifications of voters, and makes no provision for registration laws, any statute that requires previous registration as a prerequisite to the right to vote is *ipso facto* void.

The court said: "The legislature would have the power by implication, had it not been expressly conferred, to prescribe the manner of regulating and conducting elections; but the right to vote itself has been placed beyond their interference or control. This fact seems to have been forgotten in framing the act. And how different, apparently, was the framers' conception of the important nature of the right from that of Lord HOLT, nearly two hundred years ago, a judge who was never accused of being recreant to the liberties of Englishmen: 'That a right which a man has, to give his vote at the election of a person to represent him in parliament, there to concur in the making of laws, which are to him his liberty and property, is a most transcendent thing, and of a high nature.' *Ashby v. White*, 2 Ld. Raym. 953. If the attention were not permitted to wander beyond the act itself, the thought would hardly occur that the legislature were dealing with a right vested in the citizen by the Constitution, a right of which 'no department of the government, nor all of them combined,' said the court in *State v. Adams*, 2 Stew. (Ala.) 239, 'have the power to divest an individual, otherwise than is prescribed by the Constitution.' So in *Brown v. Hummel*, 6 Penn. St. 80, COULTER, J., said: 'The most important of all our franchises—the right of an elector and citizen—cannot, in a confined sense, be called property. It is not assets to pay debts, not does it descend to the heir or administrator. But who does not feel its value, and who but would turn pale if he thought he could be deprived of it, without hearing or trial, by act of assembly?'

"Important however as the question may be, we approach its consideration without solicitude other than an anxiety to understand and declare the law of the land. That inveterate argument, the gravity of declaring an act of the legislature unconstitutional, was urged as usual in such cases. If however a law be unconstitutional, the gravity of not declaring it to be so is also worthy of consideration. Our Constitutions are 'written securities of liberty,' as Chief Justice RUFFIN has expressed it. That sound and able judge, Mr. Justice CAMPBELL, of Michigan, well said in *Sears v. Cottrell*, 5 Mich. 283, that 'every unconstitutional law which is made to stand creates a permanent and deadly evil by overturning the only safeguards we have against public usurpation.' The judiciary, as the guardians of the people's constitutional liberties,

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must in duty observe that vigilance against constitutional encroachment which is said to be the price of liberty. The rules of law are beyond the control of those who are merely to declare what the law is. In every case the gravity consists in ascertaining what the law is. A text of the famous Littleton has come down to us in the Year Books (Y. B. 6th ed. 4, 8, pl. 18), *La ley est tout un en friend et meind*, 'the law is one, in great things and small.'

"The right to vote under the Constitution is a vested constitutional right. 'When I say a right is vested, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land.' CHASE, J., *Calder v. Bull*, 3 Dall. 394. If the right be vested by the Constitution, it denotes a right that cannot, under the Constitution, be taken away. *Rich v. Flanders*, 39 N. H. 385; *Eakin v. Raub*, 12 Serg. & R. 360. It would seem that every case, from *Capen v. Foster*, 12 Pick. 485; s. c., 23 Am. Dec. 632, down, which has sustained against similar objections the constitutionality of a registry law which requires previous registry as a prerequisite to the right to vote, has taken it for granted that such laws were mere rules of procedure. It was assumed in *Capen v. Foster* that the right to make investigations into the qualifications of voters necessarily implies the right to compel the voter to furnish previous proof of his qualifications; that such a law was but 'a reasonable and convenient regulation of the mode of exercising the right of voting.' It was placed on the same footing with a law which required the voter to offer his vote in writing. Now, voting *vote* or by ballot is a pure rule of procedure. So are laws of regulating polling places and the times for opening and closing the polls. He who takes a check to a bank to cash it must indorse it. He who pays money is entitled to a receipt. This is procedure. But if a contract be to pay money on a fixed day, a subsequent law requiring the payee to give ten days' notice of the time and place of payment or no obligation to pay shall arise, affects the substance of the contract, and is void. It is conceived that laws are of like nature that require previous registry in order to vote. Where the right is secured by the Constitution, such laws, having merely a legislative sanction, are void.

The true view of that question seems to be that stated in *State v. Baker*, 38 Wis. 86, that where registry is required as a prerequisite to the right to vote such registry is a condition precedent to the right itself, and therefore a rule or substantive law. This principle was subsequently practically applied in *Dells v. Kennedy*, 49 Wis. 555; s. c., 35 Am. Rep. 786, in which a registry law of Wisconsin was held to be void. It results as follows: A 'right' has been defined by Mr. Justice Holmes to be the legal consequence which attaches to certain facts. 'The Common Law,' 214. Every fact which forms one of the group of facts of which the right is the legal consequence appertains to the substance of the right. The right to vote under the Constitution may be defined to be a vested right in *presenti*, to be exercised in *futuro*, on a fixed day. When that day arrives, and the right is to be exercised, every fact essential to the existence of the right is a substantive fact. Previous registry in order to vote is precisely such a fact. It is a condition precedent which must be performed, or when the day arrives no right will exist. Procedure *ex vi termini* appertains to the mode of enjoyment or enforcement of a right. No rule of procedure can operate anterior to the time when the right is to be en-

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joyed or enforced. It cannot have effect to determine a right before the right accrues. The distinction therefore sought to be drawn on this subject between what constitutes a qualification, and what in contradistinction is called a mode of proof of qualification, is unsubstantial.

“ We may say of the attempted distinction, in the words of a chief justice of England centuries ago: ‘ Therefore we must take off this veil and cover of words, which make a show of something and in truth are nothing.’ ‘ Every definition of the qualification of voters,’ said Mr. Drake, the author of the *Law of Attachment*, arguing in *Blair v. Ridgely*, 41 Mo. 168, ‘ is but a statement of the terms on which men may vote; and in every instance such definitions refer to what a party has done as well as to what he is. They say to the voter: ‘ If you have done certain things you can vote.’ He who does not register is not qualified to vote, and hence is not a ‘ qualified elector,’ a phrase that is used five times in the Constitution to signify those who are entitled to go to the polls on election day and legally vote. See *Byrne v. State*, 12 Wis. 524; *Sanford v. Prentice*, 28 Wis. 878. But under this act he who goes to the polls on election day, possessing every constitutional qualification, may find that the legislature has stepped in between him and the Constitution. He finds his vote denied because he has not done something which the legislature has required him to do. He discovers that he is not a qualified elector, and yet he is told that his omission to do the act which had effect to disqualify him is not itself a disqualification; or if he have performed the act his performance does not constitute a disqualification. This will not square with the logic of facts. The distinction between what is substantive and what is modal is confounded. He who has a right to something to-morrow can never be secure of his right before to-morrow comes. If this can result, the Constitution does not mean what it says.

“ *McCafferty v. Guyer*, 59 Penn. St. 111, very aptly says: ‘ Can the legislature then take away from an elector his right to vote while he possesses all the qualifications required by the Constitution? This is the question now before us. When the citizen goes to the polls on election day with the Constitution in his hand, and presents it as giving him a right to vote, can he be told: ‘ True you have every qualification that instrument requires; it declares you entitled to the right of an elector; but an act of assembly forbids your vote, and therefore it cannot be received.’ If so the legislature is superior to the organic law of the State; and the legislature, instead of being controlled by it, may mould the Constitution at their pleasure. Such is not the law.’ And so must we say in this case.

“ Where a Constitution provides, as does that of New York, ‘ that laws shall be made for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage,’ the power to pass a registry law seems fully implied. See *U. S. v. Quin*, 8 Blatchf. 59. The case of *State v. Butts*, 31 Kans. 554, was grounded on a like constitutional clause. The difference between those cases and the present is the difference between a case where a power has been conferred and a case where it has not. So on the other hand a question can never arise under a Constitution like that of Texas, which has declared in unequivocal terms that ‘ no law shall ever be enacted requiring the registration

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of the voters of this State.' See *U. S. v. Slater*, 4 Woods, 358, 824. The right of the plaintiff to maintain this suit is set at rest by the decision of this court in *Corman v. Woodruff*, 10 Or. 188. The opinion cites, with many other cases, *Page v. Allen*, 58 Penn. St. 838, which presented this very case." THAYER, J., dissented.

SCOFIELD V. RAILWAY COMPANY.

(43 Ohio St. 571.)

Railroads — discrimination in freights.

A railroad company, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agreed to make a rebate on the published tariff on such freights to the prejudice of the other shippers of like freights under the same circumstances. *Held*, (1) contrary to public policy, and void; (2) that an injunction should issue; (3) that although the railroad extended into other States the injunction should extend to its whole line. (*See note*, p. 862.)

ACTION for injunction to restrain defendant from collecting freights. The head-note states the point. The plaintiff had judgment below.

I. E. Ingersoll, Estep, and Dickey & Squire, for plaintiff.

Ashley Pond and C. G. Gitzen and Dawners, for defendant.

ATHERTON, J. The main question in this case, and to which all others are subordinate, is this:

Has the defendant a right to discriminate between its freighters and customers, and furnish transportation to one at a less rate than to others, in a case where such discrimination is injurious to and destructive of the legitimate business of others?

That ultimate question requires the consideration of several other propositions and queries, some of which may be stated as follows:

1. What were the rights and duties of common carriers at common law, and was the shipper entitled to have his goods shipped at a rate equal to that charged to others, or was he entitled to any protection other than to have his goods transported for a reasonable compensation?

2. What changes, if any, have been made by statute in this State

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touching the duties and liabilities of a common carrier at common law?

3. Is the contract made between the defendant and the Standard Oil Company, and mentioned in the pleadings, good in law, or is it void on grounds of public policy?

4. Can the remedy sought by plaintiffs in this case be administered by a court of equity by means of an injunction?

The District Court has found that the defendant is a consolidated railroad company owning and operating a railroad extending from Buffalo, New York to Chicago, Illinois, passing through Ohio and parts of Pennsylvania, Indiana, Michigan and Illinois, with branches extending to Detroit and Grand Rapids, and that defendant is a public corporation and a common carrier in the business of transporting persons and property for hire and reward over its line and branches.

The defendant having acquired through its charter the right of eminent domain and the franchise to construct its road, and to demand and receive tolls, is to be distinguished from a mining or manufacturing or other private corporation. By accepting its charter, and claiming and exercising the peculiar rights and privileges enjoyed by public corporations, and "being a creature of the law and intrusted with the exercise of sovereign power to subserve public necessities and uses, the defendant is bound to conduct its affairs in furtherance of the public objects of its creation."

The legal theory seems to be that it is the duty or the right of governments to provide improved facilities for the public travel and transportation at the public expense, and this duty has been discharged by all civilized governments. It was found that these improved modes of travel and transportation could not always be provided by private enterprise, and that to construct canals, turnpikes, railroads, etc., required the exercise of the right of eminent domain, and the powers of general taxation. In the further progress of events as private wealth increased, it was found politic and convenient to intrust these functions of the government to individuals united together as public corporations under a grant of the government. The railroad corporation in consideration of the franchise received, giving the public the right to use its road, and subjecting itself to the restraint of the government through its legislature and judiciary to prevent any abuse of the powers so granted.

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“While the law affords railroad corporations adequate and complete protection in the exercise of their chartered rights, it also holds them to a strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted. In cases of apparent conflict between the rights and powers conferred and the duties imposed, the solution may oftentimes be rendered easy by regarding the admitted right of public use as the touchstone of judicial interpretation.” *Railroad Comm. v. P. & O. C. R. Co.*, 63 Me. 269-278.

It is because of the fact that such corporations are public corporations, being vested with a portion of sovereign power delegated to them by the State, and owing duties to the public, that they have been held subject to the right of mandamus to oblige them to fairly and fully carry out the public object of their creation. *Rex v. Barker*, 3 Burr. 1267; *State v. R. Co.*, 29 Conn. 538; *Ang. & Ames Corp.* 694.

It is on the same theory that acts of the legislature have been sustained as constitutional, requiring railroad corporations to establish stations at particular places on their roads, and to supply reasonable accommodations to the people of the smaller localities, and to do justice to the different sections through which their railroads pass. *Commonwealth v. Eastern R. Co.*, 103 Mass. 258; s. c., 4 Am. Rep. 555.

The fact that parties using the road are required to pay fare for transportation in no way conflicts with the views expressed.

“The fare is the consideration for the service performed, whether done by the State directly, or by a corporation under a grant from the State; it is simply a substitute for the tax rendered necessary when the State builds and conducts railroads at the public expense; the corporation upon the payment of the fare is under the same obligation to render the required service for the public, that the State would be, if railroads were free and conducted by State authority. Nor does the ownership of railroads, whether it be in the State or a private corporation, affect the nature of their use, since in either case the function to be exercised and the uses to be subserved are public.” *Railr. Comm. v. P. & O. C. R. Co.*, *supra*, 275.

“In considering the right of the public to the use of railroads, and the public interest resulting from this right, it should not be overlooked that the payment of fares is more than compensated in general by the reduced expense of travel and transportation by this

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mode over other means of conveyance, in addition to the other advantages, public, private and local, resulting from the establishment of railroads. * * * This beneficial public interest is intended, among others, to be secured under the franchise granted to railroad corporations; and the public have an interest that this result should be attained and maintained by them." *Railr. Comm. v. P. & O. C. R. Co., supra*, 276-7.

A similar doctrine is stated by the Supreme Court of Pennsylvania: "Wherever a charter is granted for the purpose of constructing a railroad, and the corporation is clothed with the power to take private property in order to carry out the object, it is an inference of law from the extent of the power conferred, and subject-matter of the grant, that the road is for the public accommodation. The right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages it results from the nature of the right that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men and denied to others." *Sanford v. Railroad Co.*, 24 Penn. St. 378.

The learned Chief Justice BRASLEY, in pronouncing the judgment of the Supreme Court of New Jersey, said: "In my opinion, a railroad company, constituted under statutory authority, is not only by force of its inherent nature a common carrier * * * but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation they are still sovereign franchises, and must be used and treated as such they must be held in trust for the general good. If they had remained under the control of the State, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. * * * In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is they must

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in the exercise of their calling observe to all men a perfect impartiality." *Messenger v. Penn. R. Co.*, 36 N. J. Law, 407.

"A railroad corporation, in view of its origin, objects, uses and the control of the government over it is a public corporation, though its shares may be owned by private individuals. It is a governmental agency for public purposes." *Talcott v. Township of Pine Grove*, 1 Flip. 120. See also *McDuffee v. P. & R. Co.*, 52 N. H. 430; s. c., 13 Am. Rep. 72.

The defendant's attorneys in their brief well say: "It cannot be questioned that the reason why a common carrier is restricted to a reasonable rate is the same that causes the limitation at common law upon the rates charged by a wharfinger licensed under the statute. In reference to a railroad company it may be truly said that it exercises a *quasi* public employment. While railroads are managed for private benefit, and their profits arising from their operation go to individuals, yet they are treated as merely a public convenience and agency in the matter of State and inter-State commercial intercourse." And see *Erie & N. E. Railroad v. Casey*, 26 Penn. St. 287.

The above authorities abundantly show that railroad companies are common carriers, receiving from the State a delegation of a portion of its sovereign powers for the public good. That being public agents, and in the place and stead of the government exercising public duties, they are therefore subject to the legislative and judicial authority to correct the abuse of their privileges and powers.

The next question is, whether these *quasi* public agents are required to treat all citizens and customers alike as to terms upon which they will transport freight.

It is claimed by the defendant that it is not bound to carry freights for all freighters at the same rate, but its duty is fully discharged if it carries for all, charging none more than a reasonable rate. On the contrary, the plaintiffs contend, that at least under the facts of this case, they are entitled to the same rates as their more favored rival. They allege and the court find that they have been and are carrying on in a large way, at Cleveland, Ohio, the business of refining crude petroleum, and selling it in the region reached by the defendant's railroad, branches and connecting lines. That they have a large capital so employed, and have established a large and profitable trade throughout such territory. That their

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refinery cost about \$70,000, and that plaintiffs have a refining capacity of about 150,000 barrels per year. And it is contended, and the facts would seem to establish, that the admitted difference of ten cents a barrel between the rate charged plaintiffs and that charged the Standard Oil Company would make to the plaintiffs, if there was no discrimination practiced, a yearly sum of \$15,000 on the out-put of plaintiff, or more than twenty-one per cent on the capital used in their business. That the Standard Oil Company is and has been engaged in the same business at Cleveland and elsewhere, and has manufactured and shipped nine-tenths of all the oils manufactured at and shipped from Cleveland, and that by the terms of an agreement entered into in 1875, the defendant contracted with the Standard Oil Company that in consideration of the promise of the company to ship all their product of petroleum over the defendant's railroad, it undertook to ship the same at an average rate of about ten cents per barrel below its published rates; and that plaintiffs were compelled to pay at the same time according to the published rates. Plaintiffs claim that by this discrimination, in favor of the Standard Oil Company, the latter are afforded an unfair discrimination and advantage, and can put their product on the market at a less price than the plaintiffs can afford, and thereby their profits are reduced; and by this unlawful discrimination in favor of the Standard Oil Company, the defendant is inflicting upon them great and irreparable damage, and renders it impossible to successfully compete with that company in the market, and thereby the business and trade of plaintiffs is being injured and destroyed. It will be observed that the gist of plaintiff's contention is not so much that the latter are charged a rate of compensation for transportation unreasonable in itself, as that by charging a lower rate to their more favored competitor, the latter is enabled to and is supplying the market at a price with which the plaintiffs cannot compete, and thus driving them out of the market and destroying the business and trade they have built up. One of the questions at issue between the parties is: What was the doctrine of the common law on the question of the compensation of a common carrier? Could the freighter require any thing more than that he be charged no more than a reasonable compensation, or could he demand and have his goods transported at an equal rate with the favored customer?

In many cases it has been held that the customer was only enti-

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tled to have his goods shipped at a reasonable rate, and not necessarily at an equal rate with others; and that he was not interested in the matter that somebody else was charged less. Or in the incisive language of CROMPTON, J., to counsel in an English case: "The charging another person too little is not charging you too much."

The question, so far as it related to railroads, was settled by statute in England shortly after their introduction there; and under the "equality clause" of the English statutes railroad companies were bound to charge equally to all persons in respect to all goods under like circumstances. *Pickford v. Grand Junction R. Co.*, 10 M. & W. 399; *Baxendale v. London & Southwestern R. Co.*, L. R., 1 Ex. 137; *London, etc., R. Co. v. Evershed*, 3 App. Cas. 1029; s. c., 26 W. R. 863.

And by 17 and 18 Vict., ch. 31, §§ 2, 3 and 6, the Court of Common Pleas was empowered to restrain by injunction any railway or canal company from giving undue or unreasonable preference to any particular person or description of traffic. See notes to *Coggs v. Bernard*, 1 Smith L. C. 369. So for a long period of time the English courts have had no occasion to examine the condition of the common law upon the subject independent of the statute.

In *C. & A. R. Co. v. People*, 67 Ill. 11, 17, LAWRENCE, C. J., affirms: "Another perfectly well settled rule of the common law in regard to common carriers is, that they shall not exercise any unjust and injurious discrimination between individuals in their rates of toll. * * * While the law now imposes, and always has imposed upon individuals exercising the vocation of a common carrier, the obligation of rendering service to all persons without injustice to any, how utterly unreasonable it is to claim that a corporation is to be permitted to discriminate in its tolls at its own discretion and without regard to justice," etc.

In discussing the English "equality statute" before adverted to, BEASLEY, U. J., pronouncing the opinion of the Supreme Court of New Jersey, says: "But the courts of Pennsylvania repeatedly declared that this act was but declaratory of the doctrine of the common law. * * * In a more recent decision, Mr. Justice STRONG says that the special provisions which are sometimes inserted in railroad charters, in restraint of undue preferences, are 'but declaratory of what the common law now is.' This is the

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view which for reasons already given, I deem correct." *Messenger v. Penn. R. Co.*, 36 N. J. Law, 407-412.

In some of the cases it is announced that upon the question of whether the law requires the common carrier to transport goods upon equal terms at all, or whether it only requires that the rate shall be reasonable, but not necessarily equal to all, has been differently determined by the courts of England and America. *Ragan v. Aiken*, 9 Lea, 609; s. c., 42 Am. Rep. 684.

But be that as it may, the tendency and undoubted weight of authority in favor of the doctrine that a common carrier is charged with *quasi* public duty to transport merchandise on equal terms for all parties, where the carrying for some shippers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored.

"An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others, is void as creating an illegal preference." *Messenger v. Penn. R. Co.*, *supra*.

The court also cite and make extracts from *McDuffee v. Railroad*, *supra*; *Garton v. B. & E. R. Co.*, 1 B. & S. 112; *Sandford v. Railroad*, 24 Penn. St. 378; *Shipper v. Railroad*, 47 Penn. St. 338; *Audenried v. Railroad*, 68 Penn. St. 370; s. c., 8 Am. Rep. 195; *N. E. Ex. Co. v. Railroad*, 57 Me. 188; *Vincent v. Railroad*, 49 Ill. 33; *Chicago, etc., Ry. Co. v. People*, 56 Ill. 365; s. c., 8 Am. Rep. 690; *Dinsmore v. Railroad*, 2 Fed. Rep. 465; *Crawford v. Wick*, 18 Ohio St. 190; *Cent. Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Great West. Ry. Co. v. Sutton*, 4 Eng. & Ir. App. 226.

Five cases, reported in 10 Fed. Rep. 210, were decided before Justice MILLER and Judges McCRARY and TREAT, arising in the various Circuit Court of the United States for Mississippi, Arkansas, Kansas and Colorado; and Justice MILLER, on p. 214, states as the fifth point in his opinion:

"I am of the opinion that it is the duty of every railroad company to provide such conveyances by special cars or otherwise, * * * as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business."

The case of *Hays v. Pennsylvania Company*, 12 Fed. Rep. 309, decided by BAXTER, J., in the Circuit Court of the United States,

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for the northern district of Ohio, is important in respect to one element in this case. The defendant in the case at bar claims that it was proper to enter into the contract it did with the Standard Oil Company, on account of the very large amount of freightage that company annually furnishes, and that it was lawful to discriminate in their favor on that account. The plaintiffs in that case had been engaged for several years in mining and shipping coal from Salineville, and the defendant's railroad furnished them their only means of getting their coal to market. The railroad company discriminated in favor of every shipper who shipped five thousand tons or over, and the discrimination was from thirty to seventy cents per ton, graduated by the amount shipped.

Plaintiffs were required to and did under the discrimination pay a higher rate than their more favored competitors. They brought suit to recover for the discrimination, and under the instructions of the trial judge the jury returned a verdict for plaintiffs.

The judge on a motion for a new trial said: "The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is in a qualified sense a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. * * *

The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man, engaged in mining coal and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will, sooner or later, be forced to abandon the unequal contest, and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as

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much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult with such a ruling to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and it may be not slow to make the most of their opportunities; and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else seeing the augmented power of capital organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results might follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. But it has no just claim by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress."

The District Court, in their finding 10 1-2, state that shipment by the car-load was the manner in which nearly all business was done. That on the request of either party to furnish cars, the defendant had them switched to the refineries, and after being loaded they were switched back and placed on defendant's tracks for shipment on its road.

The manner of making shipments for plaintiffs and for the Standard Oil Company was precisely the same, and the only thing to distinguish the business of the one from the other was the aggregate yearly amounts of freight shipped. We adopt the reasoning of BAXTER, J., on the better law, and hold that a discrimination in the rate of freights resting exclusively on such a basis ought not to be

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sustained. The principle is opposed to sound public policy. It would build up and foster monopolies, add largely to the accumulated power of capital and money, and drive out all enterprise not backed by overshadowing wealth. With the doctrine as contended for by the defendant recognized and enforced by the courts, what will prevent the great interests of the north-west, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregate wealth, and in league with the railroads of the land, from driving to the wall all private enterprise struggling for existence, and with an iron hand thrusting back all but themselves?

The defendant can derive no benefit or advantage in this case from its contract with the Standard Oil Company, and its discrimination cannot be upheld because of the existence of the same.

We have already held that the contract is opposed to public policy and void. [Citing *Crawford v. Wick*, 18 Ohio St. 190, and making extracts.]

Now let us look into this contract between defendant and the Standard Oil Company, and see just what it is as shown by the pleadings and findings in the case, and its aim and purpose as shown by the subsequent acts of the parties to it. Defendant having tariff rates for the public generally, in 1875, contracted with the Standard Oil Company, that in consideration of the company giving to the defendant its entire freight business in the products of petroleum, they would transport such freights for the company at certain rates dependent upon the fluctuation of the rates, but about ten cents per barrel cheaper than for any other customers; and the defendant not only agreed and undertook to carry for the company at the reduced rate, but also that they would not ship for any others at less than the full tariff rate, and if they did it was understood that the Standard Oil Company would take from the defendant all its business and deprive it of all its patronage. The understanding was to keep the price down for the favored customer, but up for all others, and the inevitable tendency and effect of this contract was to enable the Standard Oil Company to establish and maintain an overshadowing monopoly, to ruin all other operators and drive them out of business in all the region supplied by the defendant's road, its branches and connecting lines. The active participation of the defendant, in the unlawful purposes of the Standard Oil Company, is shown by the sequel. In 1883, the road

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of the N. Y., C. & St. L. R. Co. was constructed. It might become an active competitor for this business of transporting petroleum for customers other than the Standard Oil Company. It might establish such a tariff of rates that other operators in oil might successfully compete with the Standard Oil Company. If however the contract of 1875 was in force, the defendant had an exclusive right to all the freights of that company. Having that exclusive right to do all the carrying for the company, the District Court found, "that for the purpose of effectually securing at least the greater part of said trade, the defendant on the completion of the N. Y., C. & St. L. Railway, a competing line from Cleveland to the west, in the year 1883, entered into a traffic arrangement with it giving to it a portion of the shipments of said Standard Oil Company west, on a condition of its uniting with it in carrying out of such understanding as to reduced rates to said Standard Company, which arrangements still exist." How peculiar? The defendant, by a contract made in 1875, was entitled to all the freights of the Standard Oil Company, and yet say the District Court, "for the purpose of securing the greater part of said trade," they entered into a contract to divide with the new railroad, if the latter would only help to keep the rates down for the Standard and up for everybody else.

Such a contract so carried out was, in the opinion of this court, not only contrary to a sound public policy, but to the lax demands of commercial honesty and ordinary methods of business.

Defendant's counsel in his brief affirms: "We do not believe a railroad company should act unjustly; that it should favor one man more than another; that it should favor one place more than another place, or that it should crush out one person for the purpose of advancing the fortunes of another." We affirm that admitted doctrine, and upon it declare that contract void.

The cases before referred to, *New England Express Company v. Maine Central Railroad Company*; *Sandford v. Railroad Company*; *Messenger v. Pennsylvania Co.*, all enforce and emphasize the doctrine that prevents the defendant from in any way intrenching itself behind its arrangement with the Standard Oil Company. Neither of the parties to it can enforce its terms against the other. It is void in law, and a void thing is no thing.

Neither does the fact found by the District Court, that the contract "was not made or continued with any intention on the part

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of the defendant to injure the plaintiffs in any manner," make any difference in the case. The plaintiffs were not doing business in 1875, when the contract was entered into, and of course it was not made to injure them in particular. If a man rides a dangerous horse into a crowd of people, or discharges loaded firearms among them, he might with the same propriety, select the man he injures, and say he had no intention of wounding him. And yet the law holds him to have intended the probable consequences of his unlawful act as fully as if purposely directed against the innocent victim, and punishes him accordingly. And this contract, made to build up a monopoly for the Standard Oil Company and drive its competitors from the field, is just as unlawful as if its provisions had been aimed directly against the interests of the plaintiffs.

The effect of the provisions of the Ohio statutes upon the case at bar do not seem to have been much relied on by plaintiff's counsel. I think they can at least be looked to as indicative of the tendency and direction of the legislative policy of the State upon questions we are investigating.

[Omitting this consideration.]

The defendant in this case relies for its defense not only upon the doctrine so frequently found in the books declaring that common carriers are to be held to a reasonable compensation, but not necessarily an equal compensation, but particularly on the cases of *Johnson v. Pensacola & Perdido R. Co.*, 16 Fla. 623; s. c., 26 Am. Rep. 731, and *Ex parte Benson*, 18 S. C. 38; s. c., 44 Am. Rep. 564.

In the latter case a petition was filed against the receiver of a railroad to compel him to pay to a shipper out of the "receiver's fund" an amount that had been promised as a drawback to procure his custom as a cotton shipper. The receiver contested the claim on the ground that the discrimination was unlawful, but no person was shown to have been injured by, and no third person was complaining of the discrimination. Under that state of facts the shipper had judgment for his drawback.

In the Florida case the discrimination was made in favor of a shipper of lumber who under peculiar circumstances had furnished the railroad company a sum of money to complete its road and was to have the loan repaid by freight at a reduced rate. Complaints of loss and injury were made by another shipper, but there was no proof or no satisfactory evidence to show the complaining shipper.

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was injured in his business by the lower rate given to the other shipper. In both these cases reliance is placed on the doctrine that discrimination is not necessarily unlawful, and that all the freighter is entitled to is a reasonable rate not necessarily equal to all; and in the absence of any statute to the contrary, we are not inclined to question the correctness of these decisions. But if we should regard them as contrary to the doctrine we have indorsed, we would only say they would thus be overcome by an overwhelming weight of authority.

I think however that all the cases that have been referred to on their facts might be harmonized by observing the distinction so often alluded to, that is to say, that as between a consignor and the common carrier, where no other reason intervenes to engraft an exception on the rule, all the consignor can demand of the common carrier is, that his goods shall be carried at a reasonable rate, not necessarily at an equal rate with all others. But when the reduced rate is either intended to, or has a natural tendency to injure the plaintiff in his business and destroy his trade, then a necessary exception is engrafted on the more general rule, and the plaintiff has then the right to insist that rates to all be made the same for goods shipped "under like circumstances." We can perhaps fully agree with defendant's counsel, and with what he says in his brief:

"The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one, unless it be shown that unreasonable inequality has been made to his detriment."

In the Florida case, *supra*, the court say, "most of the cases treat the common-law rule strictly as between the parties, and without comparison as to the charges against others."

The double aspect in which a case of discrimination is to be viewed is well stated in the case of *St. L., A. & T. H. R. Co. v. Hill*, 14 Bradw. 579, by BAKER, J.: "The statement, one is a common carrier, *ex vi termini*, imports a duty to the public, and a corresponding legal right in the public; a right common to all. One of the duties imposed upon the common carrier is, that he is bound to carry for a reasonable remuneration, and is not allowed to make unreasonable and excessive charges. He cannot, like a merchant or mechanic, consult his pleasure or caprice in the conduct of his business, and cannot even by special agreement receive

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an excessive and extortionate price for his services. Another duty imposed on him is to make no unjust, injurious, or arbitrary discriminations between individuals in his dealings with the public. The right to the transportation services of the carrier is a common right belonging to every one alike."

Of a like tenor and effect is *Ragan v. Aiken, supra*, where the question as to statutory regulation and the rules of the common law were before the court. The railroad company or its manager, to induce parties doing business in a particular locality, and who could send by a different route, offered to carry their goods for fifteen cents per one hundred. They accepted the proposition and shipped accordingly. The complainants were charged more, as were the balance of the public along the line of the road. They charged that this discrimination was illegal, and as in this case, prayed an injunction.

[Omitting extracts.]

The doctrine here formulated will, in my opinion, reconcile all the cases upon their facts (though not perhaps all the judges have said in them), and make them consistent.

The question further presented is, if the plaintiffs have a right to relief, can they come into a court of equity and obtain it by the extraordinary remedy of injunction; and a further question is proposed by the District Court, whether section 3373 of the Revised Statutes was intended to apply to cases like the present, and if so, whether under it there is any authority for the relief of injunction. Waiving the first question for the present, we affirm the law to be that if the right of the plaintiffs existed at common law to relief by injunction, the enactment of section 3373, if that section applies to the case at all, affords only a cumulative remedy, and that such a remedy by statute would in no wise take away the remedy at common law.

So independent of the statute, we proceed to inquire whether the plaintiff has a remedy by injunction. In the case of *Sandford v. R. Co., supra*, and *C. & A. R. Co. v. People, supra*, relief was sought and afforded by injunction.

In the case of *McDuffee v. Railroad, supra*, the court say, p. 451: "There might be cases where the discrimination would be injurious; in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual, on account of the difficulty of proving

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large damages, or the incompetence of a multiplicity of such suits to abate a continual grievance, or for other reasons; in such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar, and appropriate course of law." See also 1 Pomeroy Eq. 254, 255; *Dodge v. Gardiner*, 31 N. Y. 239; *Third Ave. R. Co. v. New York*, 54 N. Y. 159; *Woods v. Monroe*, 17 Mich. 238.

We think the authorities abundantly show that in a case like the one at bar the plaintiffs can seek relief by injunction, and that it is an appropriate method to determine the rights of the parties here without first resorting to an action at law. The plaintiffs have a manufacturing capacity of 150,000 barrels per year. Shall they be compelled to bring a separate action for each car-load? What number of suits would it require? Are the damages of plaintiffs for loss of profits susceptible of easy proof, or even capable of any exact estimation? We think the plaintiffs have a clear and undoubted right to come into a court of equity and have the rights of the parties determined in a single action.

A further question is presented, whether the decree for plaintiffs should be limited to and enforced only in this State, or shall it extend to and be enforced against the defendant at all points reached by defendant's railroad, its branches and connecting lines? The District Court finds that the defendant is a consolidated company, its lines of roads extending from Buffalo to Chicago, and extending to various points in Pennsylvania, New York, Ohio, Indiana, Michigan and Illinois. It is an artificial person, and the same person in all this territory, and this court has acquired jurisdiction of the person of the corporation, and the right to enforce all proper orders against it.

A similar question was determined by the Supreme Court of New Hampshire in *McDuffee v. Portland and Rochester R. Co.*, *supra*.

That was an action brought in the courts of New Hampshire for an unreasonable discrimination practiced on that part of the railroad situate in the State of Maine, and on demurrer it was claimed the action could not be sustained, because the acts complained of happened in the State of Maine.

[Omitting extracts.]

The railroad is an entirety, whether within the State or without, and the artificial person, by the acts of the several States authoriz-

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ing consolidation, has been created one, and not two or more; and no reason is perceived why it may not be dealt with by the courts of either State that has procured jurisdiction.

This artificial person not only holds itself out, but does make contracts for the transportation of freight over its connecting lines as well as its own line, and it makes rates to points only reached by connecting lines. No reason is perceived why it should not be ordered to make no discriminations to the injury of plaintiffs in its rates to points thus reached. Of course it may at any time refuse to make any rates beyond its own lines, but if it makes rates to points on connecting lines, the rates should be equal to all. The order of the court is that the defendant be restrained, as prayed for in plaintiff's petition.

Judgment accordingly.

NOTE BY THE REPORTER.—In *Menacho v Ward*, 27 Fed. Rep. 529, it was held that while a common carrier may make discrimination in rates, based upon the quantities of goods sent by different shippers, he may not charge a higher rate to shippers who refuse to patronize him exclusively. The court, WALLACE, J., said: "The complainants are merchants domiciled in the city of New York, and engaged in commerce between that port and the island of Cuba. The defendants are proprietors or managers of steamship lines plying between New York and Cuba. Formerly the business of transportation between the two places was carried on by sailing vessels. In 1877 the line of steamships known as 'Ward's Line' was established, and in 1881 was incorporated by the name of the New York & Cuba Mail Steamship Line under the general laws of the State of New York. At the time of the incorporation of this company the line of steamships owned by the defendants Alexandre & Sons had also been established. These two lines were competitors between New York and Cuba, but for several years both lines have been operated under a traffic agreement between themselves, by which uniform rates are charged by each to the public for transportation. The two lines are the only lines engaged in the business of regular transportation between New York and Cuba; and unless merchants choose to avail themselves of the facilities offered by them, they are obliged to ship their merchandise by vessels or steamers which may casually ply between the two places.

"It is alleged by the complainant that the defendants have announced generally to New York merchants engaged in Cuban trade that they must not patronize steamships which offer for a single voyage, and on various occasions when other steamships have attempted to procure cargoes from New York to Havana have notified shippers that those employing such steamships would thereafter be subjected to onerous discriminations by the defendants. The defendants allege in their answer to the bill in effect, that it has been found necessary, for the purpose of securing sufficient patronage, to make differences in rates of freight between shippers in favor of those who will agree to

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patronize the defendants exclusively. Within a few months before the commencement of this suit two foreign steamers were sent to New York to take cargoes to Havana, and the complainants were requested to act as agents. Thereupon the complainants were notified by the defendants that they would be 'placed upon the black-list' if they shipped goods by these steamers, and that their rates of freight would thereafter be advanced on all goods which they might have occasion to send by the defendants. Since that time the defendants have habitually charged the complainants greater rates of freight than those merchants who shipped exclusively by the defendants. The freight charges, by the course of business, are paid by consignees at the Cuban ports. The complainants have attempted to pay the freight in advance, but have found this course impracticable because their consignees are precluded from deducting damages or deficiencies upon the arrival of the goods from the charges for freight, and as a result some of the complainants' correspondents in Cuba refuse to continue business relations with them, being unwilling to submit to the annoyance of readjusting over-charges with complainants. Upon this state of facts the complainants have founded the allegation of their bill that the defendants 'have arbitrarily refused them equal terms, facilities and accommodations to those granted and allowed by the defendants to other shippers, and have arbitrarily exacted from them a much greater rate of freight than the defendants have at the same time charged to shippers of merchandise generally as a condition of receiving and transporting merchandise.' They apply for an injunction upon the theory that their grievances cannot be redressed by an action at law.

"It is contended for the complainants that a common carrier owes an equal duty to every member of the community, and is not permitted to make unequal preferences in favor of one person or class of persons, as against another person or class. The defendants insist that it is permitted to common carriers to make reasonable discriminations in the rates demanded from the public; that they are not required to carry for all at the same rates; that discriminations are reasonable which are based upon the quantity of goods sent by different shippers; and that the discrimination in the present case is essentially such a discrimination, and has no element of personal preference, and is necessary for the protection of the defendants.

"Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public. *Baxendale v. Eastern Counties R. Co.*, 4 C. B. (N. S.) 78; *Branley v. Southeastern R. Co.*, 12 C. B. (N. S.) 74; *Fitchburgh R. Co. v. Gage*, 12 Gray, 393; *Sargent v. Boston & L. R. Corp.*, 115 Mass. 416, 422.

"It is in this sense that the observations found in some of the authorities

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are to be understood. So understood, the language of the opinion in *Messenger v. Penn. R. Co.*, 87 N. J. Law, 581, is apposite: 'The business of the common carrier is for the public, and it is his duty to serve the public indifferently. In the very nature, then of his duty, and of the public right, his conduct should be equal and just to all. * * * A common carrier owes an equal duty to all, and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right.'

"In the same sense the remarks of the court in *McDuffee v. Portland R. Co.*, 52 N. H. 430; s. c., 18 Am. Rep. 72, are approved and adopted as pertinent to the case in hand.

"In the present case the question whether the defendants refuse to carry for the complainants at a reasonable compensation resolves itself into another form. Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services or property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

"The defendants assume to justify upon the theory that a carrier may regulate his charges upon the basis of the quantity of goods delivered to him for transportation by different shippers, and that their discrimination against the plaintiff is in substance one made with reference to the quantity of merchandise furnished by them for carriage. Courts of law have always recognized the rights of carriers to regulate their charges with reference to the quantity of merchandise carried for the shipper, either at a given shipment, or during a given period of time, although public sentiment in many communities has objected to such discriminations, and crystalized into legislative condemnation of the practice. By the English statutes (17 and 18 Vict., ch. 81) railway and canal carriers are prohibited from 'giving any undue or unreasonable preference or advantage to or in favor of any particular description of traffic, in any respect whatever,' in the receiving, forwarding and delivery of traffic; but under these provisions of positive law the courts have held that it is not an undue preference to give lower rates for larger quantities of freight. *Ransom v. Eastern C. R. Co.*, 1 Nev. & McN. 63, 155; *Nicholson v. Great Western Ry. Co.*, 1 Nev. & McN. 121; *Strick v. Swansea Canal Co.*, 16 C. B. (N. S.) 235; *Greenop v. S. E. R. Co.*, 2 Nev. & McN. 319.

"These decisions proceed upon the ground that the carrier is entitled to take into consideration the question of his own profits and interests in deter-

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mining what charges are reasonable. He may be able to carry a large quantity of goods, under some circumstances, at no greater expense than would be required to carry a smaller quantity. His fair compensation for carrying the smaller quantity might not be correctly measured by the rate per pound, per bushel, or per mile charged for the larger. If he is assured of regular shipments at given times, he may be able to make more economical arrangements for transportation. By extending special inducements to the public for patronage he may be able to increase his business, without a corresponding increase of capital or expense in transacting it, and thus derive a larger profit. He is therefore justified in making discriminations by a scale of rates having reference to a standard of fair remuneration of all who patronize him. But it is impossible to maintain that any analogy exists between a discrimination based upon the quantity of business furnished by different classes of shippers, and one which altogether ignores this consideration, and has no relation to the profits or compensation which the carrier ought to derive for a good quantum of service.

“ The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. The question is whether the defendants refuse to carry for the complainants on reasonable terms. The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. Such a consideration might be influential in inducing parties to contract in advance; but it has no legitimate bearing upon the value of services rendered without a special contract, or which are rendered because the law requires them to be rendered for a fair remuneration.

“ A common carrier ‘is in the exercise of a sort of public office, and has public duties to perform,’ from which he should not be permitted to exonerate himself.’ NELSON, in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 844. His obligations and liabilities are not dependent upon contract, though they may be modified and limited by contract. They are imposed by the law, from the public nature of his employment. *Hannibal R. v. Swift*, 12 Wall. 262. As their business is ‘affected with a public interest,’ it is subject to legislative regulation. ‘In matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable.’”

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WAITE, C. J., in *Munn v. Illinois*, 94 U. S. 113, 134. It is upon this foundation, and not alone because the business of common carriers is so largely controlled by corporations exercising under franchises the privileges which are held in trust for the public benefit, that the courts have so strenuously resisted their attempts, by special contracts or unfair preferences, to discriminate between those whom it is their duty to serve impartially. And the courts are especially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation. Illustrations are found in the cases of *State v. Hartford & N. H. R. Co.*, 29 Conn. 588; *Hooker v. Vandewater*, 4 Denio, 849; *W. U. Tel. Co. v. Chicago & P. R. Co.*, 86 Ill. 246; *Coe v. Louisville & M. R. Co.*, 3 Fed. Rep. 775.

“The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendant in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry, or to recover the excess of charges paid to obtain the delivery of goods. The special circumstances in this case indicate that such a remedy would not afford complete and adequate redress, ‘as practical and efficient to the ends of justice’ as the remedy in equity.” *Watson v. Sutherland*, 5 Wall. 74.”

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

BROWN V. COLQUITT.

(73 Ga. 59.)

Surety — recognizance executed in blank.

A surety signed a criminal recognizance having the name of the obligee and the penalty blank, but knowing who and what the same were to be, and orally authorized the sheriff to fill the same in, and departed. The sheriff filled the blanks accordingly. *Held*, that the surety was bound.*

ACTION on a recognizance. The opinion states the case. The plaintiff had judgment below.

James F. Rogers, Ray & Walker and J. H. Lumpkin, for plaintiff in error.

A. L. Mitchell, solicitor-general, and *Harrison & Peoples*, for defendant.

BLANDFORD, J. This was a *scire facias* to forfeit a criminal bond upon which plaintiff in error was surety. He answered that he signed this bond when there was no obligee or penalty set forth; that the name of the obligee and the amount of the penalty were

* See *Phelps v. Sullivan* (140 Mass. 36), 54 Am. Rep. 442.

inserted therein in his absence. The facts shown were that the sheriff had arrested one Ball, upon six warrants, issued upon six bills of indictment; that plaintiff in error agreed to become his bail; that the sheriff had filled out several bonds which he had signed; that plaintiff in error signed the sixth bond and instructed the sheriff to insert the name of the obligee and the penalty of fifty dollars, both of which he well knew and left before the last bond had been filled out.

The court instructed the jury that under this plea or answer respondent must make out his case; and further, that the facts being true, the respondent was liable. These rulings are excepted to by respondent, and error is assigned here thereon.

1. The first error assigned is that the court erred in ruling that under this answer of respondent, the *onus* was not changed, but that it was incumbent on defendant to sustain his answer. This was a special defense. The signing of the bond is admitted; but respondent insists that he is not bound thereby, for and on account of certain reasons which he sets forth. This is not a general plea of *non est factum*, but special; in such a case the respondent is bound to sustain his plea of proofs. So the court did not err as complained of in this ground; and this could make no difference as the proofs went to the jury and plaintiff in error sustained no harm from this ruling.

2. The next question is graver, and is environed with greater difficulties, which is where a bond has been signed in blank, with the obligee's name and penalty not inserted, and the obligor directs an officer, who is authorized to take such bond, to insert the name of the obligee and penalty in such bond in his absence, and this is done, such obligee's name and the amount of the penalty in the bond being known to the obligor when these instructions are given, and the instructions being in parol and not in writing, is such a bond void, or is it binding on the obligor?

In the case of *Ingram v. Little*, 14 Ga. 173, it was decided by this court that a deed with the grantor's name signed, and sealed and duly executed without the grantee's name and the consideration being inserted therein, which was delivered to a third person in this condition, with instruction to find a purchaser for the land mentioned, and such person was authorized to insert in said deed the name of the purchaser as grantee, also the consideration of the purchase, and when such third person had found afterward a pur-

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chaser, in the absence of the grantor he inserted the name of the purchaser as grantee in this deed, as well as the consideration of the purchase money—that this deed was inoperative to pass title to the land mentioned therein, inasmuch as the person who inserted the grantee's name and the consideration in said deed, had no authority under seal to do so. Many English and American cases are referred to by the judge who delivered that opinion, and while he admits that the weight of authority in America is against the decision, yet he insists that the weight of authority in England sustains the views he presents in that opinion; but it is quite probable that the learned judge who delivered that opinion had not seen the decision in the case. *Eagleton v. Gutteridge*, 11 Mees. & W. 464.

The case of *Ingram v. Little* is not to be extended beyond the facts therein stated; it is, to say the least of it, doubtful. The case at bar is clearly distinguishable from that case. Here the sheriff was in the act of filling the bond, he had filled up the bonds, which had been signed by respondent, and when he came to fill up the sixth bond respondent signed the name, saying he was in a hurry to leave; he knew who the obligee was and the amount of the penalty; when he had signed and sealed the paper he told the sheriff to fill it out and left. In the case cited the deed was signed, sealed and delivered to a person who was to find a purchaser for the land, and then to insert the name of the grantee and the consideration in the deed, which was blank; the name of the grantee was unknown to the grantor, as well as the amount of the consideration when he gave the verbal instructions about filling the deed.

A deed may be signed, sealed and delivered by a person under instructions by parol, if the grantor be present at the time, and it will be good to pass title, because the law considers, under such circumstances, the act of the agent to be the act of the principal; if it is done at his instance and under his directions, it is his act. Why an act done by an agent under the direction and by the instruction of a person who is not present, when he is not present, is not the act of such person so directing the act to be done, it is not easy to perceive; it is as much his act in the one case as the other. Again a bond in blank, signed and sealed by a person, and delivered to another with instructions to fill up the blank in a particular way known at the time to the obligor, is equivalent to a warrant of attorney instructing such person to do that particular act. In the particular case here being

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considered, the act of the obligor in signing the bond and directing the sheriff to fill it up in a particular way, and his leaving, under the facts shown in the record, is equivalent to his being present when the bond was filled out. This being a bond payable to the governor of this State for the forthcoming of a person to answer a criminal charge, the plaintiff in error is estopped from denying this bond to be his deed. Under the facts of this case to allow his plea would be to allow him to perpetrate a fraud on the public. And it follows, if we are right in our conclusions, the judgment of the court below must be affirmed. *Judgment affirmed.*

GLOVER V. STAMPA.

(73 Ga. 200.)

Ejectment by cestui que trust — title of trustee.

In an action of ejectment, the plaintiffs claimed under a chain of title terminating in a trust deed, which provided that the trustee should hold the property for the sole and separate use of the plaintiffs for and during their natural lives, and after their deaths, to such children as they might leave, share and share alike, and in case they died leaving no such children living, then over to certain designated persons. When the deed was made, the plaintiffs were minors, but before the suit was brought, they had attained their majority. The trustee had died, and no successor had been appointed. The plaintiffs had never been in possession. *Held*, that the plaintiff was entitled to recover.

EJECTMENT. The opinion states the case. The defendant had judgment below.

Thos. W. Latham, for plaintiffs in error.

P. H. Brewster, for defendants.

HALL, J. The court granted a nonsuit upon the close of the plaintiffs' testimony in this case, because it showed outstanding title to the premises in a person who held the same in trust for them. The land was conveyed to the trustee (who was shown to have been dead at the commencement of the suit, and in whose place no successor had been appointed) to hold "for the sole and separate

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use" of plaintiffs "for and during their natural lives, and after their death, to such children as they may have at that time, share and share alike, and in case they die, leaving no such children then living," then over to certain designated persons. When the deed was executed, the plaintiffs were both minors. They had attained their majority at the institution of the suit. A perfect chain of title was shown from the State to the creator of this trust. It was conceded that the plaintiffs had never been in possession of the premises. The question is whether they showed by this title enough to carry the case to the jury and to put the tenant in possession upon proof of his title, to retain such possession.

From aught that appears to the contrary, their right to the possession, as tenants for life, was complete; as to them, the trustee had no further duties to perform than to protect their title until they reached their majority. Code, §§ 2306, 2313, 2314; *Knorr v. Raymond*, 73 Ga. 749. In this point of view it can make no difference whether the ulterior trusts were executory or executed; as to their estate, it was fully executed; they were capable of protecting their rights, without the assistance of the trustee, against an intruder, or other mere wrong-doer, and of setting them up, if necessary, against the trustee himself.

As early as 1766, the Court of King's Bench had this question before them, and it was held by Lord MANSFIELD and his associates that it had then "been long looked upon as a settled point, that the formal title of a trustee should not in an ejectment be set up against the *cestui que trust*, because from the nature of the two rights, the *cestui que trust* is to have the possession." *Armstrong v. Pierse*, 3 Burr. 1898, 1901. Again in 1774 the same pre-eminent magistrate, with the full concurrence of his able colleagues, said: "One objection that has been taken is, that the legal estate is in the trustees, and therefore the heir at law cannot recover in this ejectment. In answer to the objection, it has been often determined that an estate in trust, merely for the benefit of the *cestui que trust*, shall not be set up against him; any thing shall rather be presumed; nor shall a man defend himself by any estate which makes a part of the title of the lessor of the plaintiff." *Goodtitle v. Knot*, 1 Coop. 46. Afterward (in 1795) this point was more fully discussed by the same court in *Doe v. Pegge*, 1 T. R. 758, note a, in which Lord MANSFIELD said an ejectment is a fictitious remedy to try the title to the possession of lands; it is of infinite consequence that it should be

adapted to obtain the ends of justice, and not be entangled in the nets of form. Great difficulties have arisen as to the legal form of passing land, from the modes of conveyancing in England since the statute of uses. Trusts are a mode of conveyance peculiar to this country. In all other countries the person entitled has the right and possession in himself. But in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives, and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue from the representatives of the trustees not being to be found;" and after giving a striking instance of hardship on this account he continues: "So that where a trust term is a mere matter of form, and the deeds were the muniments of another's estate, it shall not be set up against the real owner. It is therefore settled that a satisfied trust shall be taken to be a trust for the benefit of the heir at law. A trust shall never be set up against him for whom the trust was intended. It is a mere form of conveyance, and it is admitted that where the term is in trust for the benefit of the lessor of the plaintiff, the defendant shall not set it up in an ejectment, as a bar to his recovery." ASHURST, J., in his concurring opinion said: "In such a case as this, a legal bar shall never be set up in ejectment against the justice of the case. The trustees may perform their functions as well after both the parties are in possession." BUTLER, J., agreed entirely with Lord MANSFIELD, and asserted that the doctrine laid down had prevailed "for the last forty or fifty years." Some years afterward, these cases, together with many others, both before and since, were overruled, both by courts of law and courts of equity in England, not because it was denied that the *cestui que trust* was entitled to the right of possession, but because it was said that the right was recognized only in equity, and that at law he was regarded merely as a tenant at will.

It was assumed, contrary to what we have seen was the truth, that Lord MANSFIELD was the originator of the principle. Lord REDESDALE, in *Shannon v. Bradstreet*, 1 Sch. & Lef. 66, boldly asserts that "Lord MANSFIELD had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them, which subsists with us, is not known, and that there are many things in his decisions which show that his mind had received

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a tinge on that subject not quite consistent with the Constitution of England and Ireland, in the administration of justice." When the propensity of the author of this charge against so illustrious a judge as Lord MANSFIELD to indulge in the practices he attributes to others, is remembered — notably his accusation against Lord COKE, on the trial of the *Banbury Peerage* case, that he was too fond of making the law, instead of declaring the law, and of telling untruths to support his opinions — it is a matter of some surprise that an author generally so cautious and accurate as Mr. Lewin should have adopted and set forth in his *Treatise on Trusts*, p. 519, Lord REDESDALE's account of the origin of the principle in question. Sir Harris Nicolas, in his report of the *Banbury Peerage* case, says of Lord REDESDALE, "those who are best acquainted with his speeches and opinions will smile at his opinion of Lord COKE, and may perhaps exclaim, "*Mutato nomine, de te fabula narratur.*" Nicolas Ad. Bast., p. 461 and note (2).

But to return to the subject in hand, it is very evident that but for the anxiety to keep distinct the line of demarkation between courts of law and equity as to the kind of rights and remedies that each of them administered, the decisions above cited would not have been overruled. Recent legislation in England has relaxed, if it has not abolished these shadowy distinctions. They have not been insisted upon as essential in this State since the passage of the act of 1821, Cobb, 464, allowing parties to insist upon equitable rights in courts of law, "where they conceived that they could establish their claims without resorting to the conscience of the defendant;" and now, when by our Code, § 3082, it is at the option of the suitor to institute his suit for an equitable cause of action either in a court of law or equity, their existence in this respect is surely unimportant. That such actions as that under consideration have been sustained in such of our sister States as have no courts of equity, or as have legislative enactments similar to ours, is well established. Tyler on Ejectment, 59 *et seq.*; *id.*, 64, 65; *id.*, 75 and citations. The party having the right to the possession, where it is wrongfully withheld even by the trustee, may under these decisions maintain ejectment against him for its recovery, and a *fortiori*, it may be thus recovered from a mere wrong-doer. The bare right to the possession of lands authorizes their recovery by the owner of the right, together with damages for withholding it. Such is the express provision of our Code, § 3014. The plain-

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tiff in ejectment may also recover "upon prior possession alone," as it would seem, without other right thereto than is implied from such possession "against one who acquires the possession by mere entry and without any lawful right whatever." Code, § 3366 and citations. The distinction between the bare right to possession and possession alone, irrespective of such right, is thus made manifest. In the former case, the action is given against all persons, and may be sustained unless the defendant shows a paramount right either in himself or another. In the latter the recovery may be had against the defendant, unless it is shown that he is not a mere wrong-doer. That a *cestui que trust* entitled to the possession may maintain ejectment against a stranger who has no title seems to be pretty fully established, even in the absence of such provisions as those cited from the Code. See Sedgwick & Waite Trial of Title, § 223 and citations. The judgment in ejectment need not be necessarily conclusive as to the title to the fee between the parties to the suit, for the jury may find less than the fee in favor of the plaintiff's lessor. Code, § 3362, and this seems to be in accordance with the rulings that prevailed in England prior to our adopting statute. *Doe v. Pegge, ut supra*. There was certainly enough in the evidence to carry the case to the jury and to put the defendant upon proof of his right to maintain his title to the possession. There was error in awarding the nonsuit, and the cause must be remanded for another hearing.

Judgment reversed.

RANKIN V. MERCHANTS AND MINERS' TRANSPORTATION CO.

(73 Ga. 229.)

Master and servant — negligence — stevedore.

A ship-owner is not liable for an injury to his employee by the negligence of a stevedore in loading the vessel.*

ACTION for death of plaintiff's husband by negligence. The opinion states the facts. The defendant had judgment below.

* See *Hass v. Phila., etc., St. Co.* (86 Penn. St. 269), 32 Am. Rep. 462.

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George W. Owens, Charlton & Mackall, for plaintiff in error.

W. S. Basinger, for defendants.

JACKSON, C. J. A motion was made to dismiss this declaration on the ground that no cause of action is set out therein; in other words, on general demurrer the action was dismissed. It is a suit by the wife for her husband's homicide against "the Merchants and Miners' Transportation Company," and Merritt W. Dixon, a stevedore in the employment and pay of that company; and the death occurred by reason of the loading of a ship of the company by the stevedore and his servants.

1. The question is whether the case falls within *Daly v. Stoddard*, 66 Ga. 145 and *McDonald v. Eagle & Phenix Manuf. Co.*, 68 Ga. 839. In other words, do the allegations make a case of felonious intent in the killing or such criminal negligence as constitutes an ingredient in the offense of involuntary manslaughter, because those cases by a unanimous bench most clearly so construe the meaning of our statute. Code, § 2971.

In regard to "the Merchants and Miners' Transportation Company," there cannot arise a doubt that the case made against it is a case within the rule, and weaker than either of those. It is a corporation of Maryland, with an agency in Savannah; and the only allegation against it, in respect to the accident or incident of the death, is that it had employed and paid the stevedore to load the ship, and that the gangway used in loading the ship was its property and furnished to the stevedore for that use; and that it failed to provide proper guards and side-skids to the gang-plank to prevent deceased from falling therefrom; the declaration then alleging "that deceased was standing on the gang-plank under the direction and by the order of the stevedore or his agents, and was attempting to ease down over said gang-plank into said steamship the said barrels of resin, which said barrels of resin the said Dixon (the stevedore) or his agents, with the grossest negligence, and without regard to the dangerous position of the said deceased, caused to be rolled down the said gang-plank in such great numbers and rapid succession that the skill and strength of the said deceased were totally insufficient to manage the same," the result of which was his being drowned in the river "by the gross negligence and criminal conduct of the said defendants."

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It will thus be seen that all which was done by the company was to employ and pay the contractor or stevedore, to use the technical name, to do the job of loading the ship, and to furnish for the ship's use on such occasions a gang-plank, which in consequence of the manner in which the job was done, the numbers and rapidity with which the barrels of resin were rolled upon deceased, proved inadequate for that special occasion. If the manner of rolling down the barrels had not been so rapid, it is not alleged that the unhappy incident would have followed; indeed, the inference is clear from the whole declaration that it would not.

Surely it cannot be contended that the mere employment of the stevedore to do the job made the company liable. Such a man we understand to be, "one whose occupation is to load and unload vessels in port" (Webster's Dictionary)—in other words, a contractor or jobber for special business, ready to be employed by anybody on his line. Can it be possible that his bad conduct in doing the job can make the employer criminally liable? Indeed, the case made is stronger. It is not alleged that the stevedore caused the rapid rolling, etc., but the averment is that he or his agents did it. Is the employer to be responsible not only for his employee, the contractor under him, but for all the under-employees, agents and servants, the deceased being one of them? Surely the doctrine, "*respondeat superior*," does not extend that far. It cannot most assuredly in a transaction involving criminal neglect.

It is thus seen that there is no shadow of cause of action in this case against the company; none in furnishing the plank, because if properly used it might have done well, according to the whole scope of the declaration; and none in the employment of the stevedore, because he was a contractor with his own servants, the deceased being one, and neither the company at Baltimore nor its Savannah agent having aught to do with those servants.

[Omitting a minor point.]

Judgment affirmed.

Western Union Telegraph Company v. Fatman.

WESTERN UNION TELEGRAPH COMPANY V. FATMAN.

(78 Ga. 285.)

Telegraph — cipher despatch — duty to deliver.

A telegraph company is liable in damages for unreasonable delay in the delivery of a cipher despatch, and the recovery is not limited to nominal damages.

ACTION of damages for delay of telegram. The opinion states the case. The plaintiff had judgment below.

Charlton & Mackall, for plaintiff in error.

Garrard & Meldrim, for defendant.

JACKSON, C. J. This is an action brought by a ship broker in Savannah against the Western Union Telegraph Company for unreasonable delay in delivering a cablegram, whereby the broker was damaged the loss of his commissions from a contractor to take his ship, the time given the broker having expired and his customer having taken another ship by reason of the delay of the company in delivering the cablegram. No question is made on any error in the transmission to Savannah or delay in reaching that city; but delay in the failure to deliver to the broker after it reached Savannah, is the ground for recovery and the issue in the case.

The jury found for the broker the commissions he lost by non-delivery of the dispatch in time, and a motion for a new trial denied below makes the questions for review here.

[Omitting minor points.]

2. The next point insisted upon is that there can be no recovery on a cipher telegram, except nominal damages, unless the company be advised of its value, and the counsel has pressed this point, and with power, and cited many authorities from England and our own State courts bearing thereon.

In the view we take of the question, it becomes unnecessary to examine close these numerous cases, which are somewhat variant in shades of opinion and diverse in conclusions reached, because we think that the case of *Western Union Telegraph Co. v. Blanchard*, 68 Ga. 299; s. c., 45 Am. Rep. 480, gives the views of this court on the point so fully in principle as to settle it in this State.

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There a telegram was in these words: "Cover two hundred September and one hundred August." One defense being that the telegram was in cipher, evidence was admitted to decipher or explain it, and not nominal, but the real damages, naturally flowing from the company's failure in duty, were recoverable. True those words are not pure cipher, but they are wholly unintelligible, every whit as much so as the words here; yet this court held that there was enough in them to show that the message was commercial and of value. Cablegrams had crossed the ocean for days by the broker in the case at bar; he was neighbor to the agents at Savannah, his office within five minutes' walk of theirs, the fact that this was a communication between a ship broker and a company in Liverpool, and couched in language so singular and unintelligible to the common reader, all taken together, make a case as strong as that cited from 68 Georgia to put the company on notice that this was important commercial business and required reasonable and ordinary dispatch.

Besides whether valuable or not, it is the contract to deliver the message in a reasonable time, and the judge of this court, at once learned and cautious, charged the jury only to that effect, and put the issue of delivering in a reasonable time fairly and clearly before that body. Whilst the duties of the telegraph company are similar to those of ordinary common carriers, and so much so as to make it proper to call them, and in many respects treat them, as *quasi* common carriers, yet as their charges are based on number of words, and not on weight as carriers of ordinary freight, or on value, as express companies, the rule of liability should not be the same, as respects notice or no notice, of the value of the dispatch. That word "dispatch" is the very core of the body of such a company, whether it be called carrier or bailee, or any other name. People write messages by them, and not by the slower mails, because they are in need of haste. Business, or family necessity, sickness or death, make dispatch in this mode of conveyance the very consideration on which they use it, on which they pay higher rates for it, and surely the message so sent, when received, must be delivered with reasonable dispatch in all cases, and if not, the damages sustained by failure must be paid. The thing they undertake for money to carry must be carried to the place of destination, and that is to the office or house where due, for nobody goes, or is required to go to their office for answer, but it is their duty to send it to him.

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Besides, if a cipher or unintelligible communication might be rejected by them, or put on terms by special contract, and if in this sense they may not be common carriers of everything, yet when they undertake to carry it and receive message and money in consideration of the one to deliver the other, ought it not to be done? Of course it ought. When? Of course within a reasonable time. Where? Just where the man who pays for the delivery expects to get it and where they agreed to deliver it, and showed in this case that they did so agree by delivering it at the broker's office, though too late.

Judgment affirmed.

NORTH V. MENDEL.

(13 Ga. 400.)

Statute of frauds — memorandum — separate papers.

The defendants orally bargained with Freeman, claimed by them to be the agent of the plaintiffs, and by the plaintiffs to be a broker, for the purchase from the plaintiffs of pork at a price exceeding \$50. Freeman telegraphed to the plaintiffs: "Mendel five bellies, eight. Ehrlich offers seven-eighths ten bellies lighter than last." On the same day he made the following entry in his entry book: "Sold account C. H. North & Co., Mendel, 5 bellies, 8." *Held*, not a sufficient memorandum to comply with the statute of frauds.

ACTION for price of goods sold. The opinion states the case. The defendant had judgment below.

Lawton & Cunningham, for plaintiffs in error.

Richards & Heyward, for defendants.

HALL, J. The plaintiffs brought suits against M. Mendel & Brother, a firm composed of Meyer Mendel and Joseph Mendel, upon an account for five boxes pork bellies, 124 pieces, 2,817 pounds, at eight cents, \$225.36, sent from Boston on the 17th of January, 1884, to Savannah, per steamship City of Columbus. The goods were sent upon the order of George C. Freeman, who was alleged by the plaintiffs to be a broker, but who was regarded by the defendants as the plaintiffs' agent, and dealt with them according to their evidence in the latter character. This shipment was made upon a telegram sent from Savannah to Boston on the 16th

day of January, 1884, by George C. Freeman to plaintiffs, which was as follows:

“Mendel five bellies, eight. Ehrlich offers seven-eighths ten bellies lighter than last.”

In Freeman's entry book under this date, the following appears, as was proved, in his own handwriting:

“Sold account C. H. North & Co., Mendel, 5 bellies, 8.”

This telegram together with the entry was the only note or memorandum in writing of the contract sued on. The steamship shortly after sailing was wrecked, and her cargo was lost. The goods never reached the defendants. Under the evidence in the case the jury found for the defendants, and a motion made for a new trial was overruled. On the judgment overruling this motion, error is assigned.

The defense set up was that the suit was upon a contract for the sale of goods amounting to \$50 and more; that the defendants never accepted and received any part of the same; gave nothing in earnest or part payment to bind the bargain; and that the promise was not in writing and signed by them, nor by any person authorized by them to do so. Code, § 1950, sub-sec. 7. It is conceded that if Freeman did not act as a broker in the transaction, and if the word “Mendel” in his entry book is not the signature of defendants, which he was authorized to make, and if the delivery of the goods on board the vessel consigned to them was not an acceptance and delivery of the same to them, then they are not liable under this section of the Code, and their defense must prevail. The verdict seems for these reasons to have been sustained by the lower court, the evidence on both points being conflicting.

The testimony of the defendants, which the jury had a right to credit, showed that they did not then and had never dealt with Freeman as a broker, but had always dealt with him as the agent of the plaintiffs, and had never given him authority to sign their names to that or any other promise in writing; that Freeman came to them on the occasion in question, as he had usually done on former occasions, soliciting orders for the plaintiffs, as whose agent they regarded and treated with him. On the other point, they showed that they dealt with the plaintiffs for cash, and according to their usual course of dealing, goods ordered were never considered as belonging to them until delivered at their place of business and paid for.

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The plaintiffs' evidence tended rather inferentially than directly to rebut both these positions, so that if there were nothing else in the case, we could not say that there was not evidence to sustain the verdict, and that the judge did not exercise a sound discretion in refusing to set it aside and to grant a new trial.

Admitting that the last of these points is with the defendants, then the plaintiffs insist that Freeman was a broker; that he ordinarily acted in that and in no other character; and that the defendants knew this and must have dealt with him in that capacity, and have given him authority to bind them by signing their names to a promise in writing, which he did by this entry in his book; that while it is true their names were not subscribed by Freeman to the entry, still if it appeared anywhere in the same, that was sufficient to bind them. Much extraneous evidence was offered and received, over the objection of defendants, to explain and render intelligent both this cabalistic entry and telegram. To the introduction of this the defendants objected, and their objection being overruled, they filed exceptions to the decision, and have brought it here for review.

We are of opinion that this memorandum, taken either by itself or in connection with the telegram, does not satisfy the requirements of the statute; without such evidence it would be impossible to connect these papers as forming parts of the memorandum of the agreement relied on. The statute does not require that all the terms of the contract should be agreed to or written down at one and the same time, nor on one piece of paper; but where the memorandum of the bargain is found on separate pieces of paper, and where these papers contain the whole bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the signed paper make such reference to the other written paper or papers as to enable the court to construe the whole of them together as containing all the terms of the bargain. If however it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the signed paper to show a reference to, or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain, so as to satisfy the statute. 1 Benjamin on Sales, § 220 and note 24. *Smith v. Jones*, 66 Ga. 388; s. c., 42 Am. Rep. 72, is upon this question directly in point. But supposing the entry and

telegram to be united by the internal evidence furnished by themselves, then they would not satisfy the statute, because they fail to show what property was contracted for, what price was agreed upon, and the parties to whom it was sold. "Sold account of C. H. North & Co., Mendel, 5 bellies 8," as expressed in the entry, or as expressed in the telegram, "Mendel, five bellies, eight; Ehrlich offers seven-eighths, ten bellies lighter than last," contain matter not only ambiguous, but unintelligible to any one but Freeman and the plaintiffs, without explanation, or rather translation, by a resort to parol evidence, and this was the very thing the statute was enacted to prevent, in order to take away all temptation to commit either fraud or perjury. 1 Benj., § 210, and citations in note (1) and 7 there; 1 Benj., §§ 233, 236, 247, 249-252, inclusive. By reason of these deficiencies, this alleged contract was imperfect, and could only be made perfect by a resort to parol testimony, which was incompetent for such a purpose. *Smith v. Jones, ut supra*. "Mendel," by itself and unaided by other evidence, could not be taken as the firm name of the defendants, while "5 bellies, 8" is, to the last degree, enigmatical, if not wholly unintelligible. Waiving any question as to the commodity sold, both the quantity and the price are wholly indefinite; in these respects there is no ambiguity either latent or patent, which in either case could be explained by a resort to parol evidence, but the uncertainty is great and manifest, and it has not been shown that the terms employed here are in accordance with any mercantile usage or custom in reference to which the contract was made. The contract is therefore faulty in failing to set out the purchaser, the quantity and price of the article sold; these are all essential ingredients, and should have appeared, as we have seen, in the memorandum of the bargain.

It was remarked shortly after the passage of the act of 29 Ch. II, for the prevention of frauds and perjuries, from which our law is taken, with the modifications since made therein by the interpretation of the courts and judges, by a venerable and distinguished judge, that every line of that celebrated statute was worth a subsidy to the people of England, and many learned and able administrators of the law have expressed regret that the force and efficiency of this act have been impaired by the least departure from its plain provisions, and by construing it so as to introduce exceptions not authorized by its letter. Some of these exceptions are embodied in our Code, and so far as they are there recognized

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we have no power to reject them; but we will not add others by construction to avoid what may appear to be either harsh or inconvenient. We repeat with all the emphasis that the unanimous judgment of this bench can give it, what was said by the present chief justice in pronouncing the judgment of the court in *Smith v. Jones, supra*, that "the rule should not be relaxed now, when the flood-gates are open wide as to the competency of witnesses, and the only break-water left is to put this class of contracts and others of similar character in writing." The case in hand falls under no exception recognized by our law, and the testimony objected to on the trial by the defendants should have been repelled. Without it there was nothing to rest a verdict on in favor of the plaintiffs. Whether the result of the trial was attained by proper methods, it is sufficient that the verdict is necessarily correct, and the court was right in allowing it to stand.

Judgment affirmed.

LOOKHART V. WESTERN AND ATLANTIC RAILROAD.

(13 Ga. 492.)

Bailment—action for injury to thing borrowed.

The borrower of a painting cannot maintain an action for its destruction while in the possession of a carrier for transportation.

ACTION for loss of goods. The opinion states the case. The defendant had judgment below.

Robert B. Trippe, for plaintiff in error.

Julius L. Brown, for defendant.

HALL, J. The plaintiff brought suit in a justice's court against the defendant for \$100 "damages to personal property." The cause of action attached to the justice's summons was for injury and damage done in destroying an oil painting representing Tallulah Falls, and for injury to the frame of said picture, said package having been received for transportation as freight by the Western and Atlantic railroad at Kingston, Ga., to be transported to Atlanta, Ga., \$100. The justice awarded judgment to the plaintiff for the amount sued for, and from this judgment an appeal was taken.

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to the Superior Court of Fulton county. On the appeal trial, a freight receipt given by the agent at Rome, Ga., to Daily for the picture in question, to be shipped from that point to Atlanta, and consigned to R. G. Lockhart, was put in evidence by the plaintiff. It was shown that the package containing the picture was in good order when delivered at Kingston to the defendant; when it reached Atlanta, the painting and frame were both demolished to such an extent as to be utterly worthless; the value was proved. The plaintiff proved that the picture belonged to her brother, who had suffered her to keep it until he called for it, and if he never did so, it was to be her property. She further testified that she was responsible for its delivery to him. At the close of the testimony, a nonsuit was moved and granted by the court, and to this judgment the plaintiff excepted.

The picture was an heirloom in the plaintiff's family, and was prized by her on that account; she does not appear to have derived any revenue by exhibiting it; it was intrusted to her for safe-keeping and for her personal pleasure and for the gratification it afforded herself and friends; she had no property, either general or special, in it, and in her own name could maintain no action for its loss or destruction. The action should have been brought in the name of the owner. The plaintiff was only a borrower (29 Ga. 356), and acquired no title in the picture loaned; her right was to possess and use it, and for any interference with that right she might maintain an action. Code, § 2129. In all cases of bailment, where the property is in possession of the bailee, and a trespass is committed during the continuance of the bailment, this gives the bailee a right of action for interference with his special property, and a concurrent right to the owner or bailor for the interference with his general property. Code, §§ 3030, 2091, 2141.

It is admitted that a carrier cannot dispute the title of the party delivering goods for transportation by setting up title in himself, or a title in third persons, which is not being enforced against him. Code, § 2476, and citations. But that is not this case; he sets up no adverse claim; does not refuse to deliver the property to the consignee. The plaintiff herself shows that she has no interest in, or title to the property which has been damaged, and for which she asks to recover compensation. The nonsuit was properly awarded because it appeared from her own evidence that she had no right to maintain the suit.

Judgment affirmed.

Simmons v. State.

SIMMONS V. STATE.

Criminal law — larceny from the house.

(73 Ga. 609.)

A person having money of his own in a satchel went into the banking-house of another, and temporarily deposited it upon the counter, and while standing within about two feet of it, another person called his attention away, and a third abstracted money from the satchel. *Held*, larceny from the house.

CONVICTION of larceny from the house. The opinion states the case.

M. P. Carroll, Twiggs & Verdery, for plaintiffs in error.

Boykin Wright, solicitor-general, by *H. C. Foster*, for the State.

HALL, J. [Omitting other points.] While it is admitted that the defendants were shown by the proofs to have committed simple theft or larceny, or perhaps larceny from the person, yet it is contended, with signal ingenuity and marked ability, that they could not be convicted under the law and evidence of larceny from the house, the offense for which they were indicted. The satchel from which the money was stolen was temporarily deposited upon the counter of a banking-house, in the city of Augusta, about two feet from where its custodian was standing. The money did not belong to that bank, but to another in the same city; the person having charge of it had visited the house in which it was stolen for the purpose of having a check cashed; while standing at the counter on which this satchel was placed, his attention was diverted from it by one of the defendants, when the other abstracted from the bag \$2,500, when both immediately left the house with their booty. It is insisted that these facts do not make out the crime of larceny from the house, because the satchel was not under the protection of the building; that it was neither the property of the owners and occupiers of the same nor was it deposited there for safe-keeping, but there casually, and as it were, in *transitu*, and that the theft was committed in the immediate presence of the party having rightful charge of the money. These circumstances, it is urged, distin-

guish this from the offense charged, and quite a number of cases have been produced and relied on to show, that under the English statutes and the statutes of some of our sister States, it could not be larceny from the house.

We need not stop to inquire whether the cases relied on justify the conclusion sought to be drawn from them, as we are satisfied that under our own Code, the indictment and conviction were proper. If a party break or enter any house with the intent to steal, or after breaking or entering the same, does steal therefrom any money, goods, etc. (Code, § 4413), or if by day or night any person shall in any building privately steal any money, etc. (Code, § 4414), or if such person shall enter a house with intent to steal, but is detected and prevented from effecting his intention (Code, § 4415), or if he shall break a house with like intent, but is prevented, etc. (Code, § 4416), or if he shall both break and enter, or break or enter, with like intent, but is detected and prevented (Code, § 4417), in each of these cases he is guilty of the offense of larceny from the house, as was expressly held by this court in *Jenkins'* case, 50 Ga. 260. The offense, as in this instance, is consummated, if the money, goods, etc., be privately stolen in any of the houses or buildings enumerated in section 4414 of the Code. *Middleton's* case, 53 Ga. 249. The Code does not make either the ownership of the property stolen or its custody by the occupant or proprietor of the building, or the presence or absence of the owner at the time of the theft, an essential ingredient in this offense, and were we to engraft upon it any such conditions, we should be legislating rather than construing or interpreting what the legislature has done. The *situs* of the property in a house or building of the character specified in the Code, when connected with other facts, constituting larceny as defined by the several statutes, is the additional fact essential to constitute the crime of larceny from the house. This is not an offense against the habitation, but is an offense against the property, as contradistinguished from the building. This distinction is recognized by the Penal Code. Crimes against the "habitation" consist of arson and burglary; those against the property consist of robbery and the various species of larceny, etc. They are arranged under the same part and title, but under different divisions of the Code; the former is treated of under Division V, and the latter under Division VI of Part IV and Title I of the Code.

Simmons v. State.

In *Williams'* case, 46 Ga. 217, this distinction is made clear, where it is said by WARNER, J., "Burglary is an offense against the habitations of persons. Larceny from the house is an offense relative to property;" and this distinction exists "for the simple reason that the law so declares." That the owner or custodian of the property being present in the house when it is stolen is an immaterial circumstance in the commission of the offense, is evident from the fact that the crime is complete if the defendant is detected and prevented from carrying his intention into effect. *Williams'* case, 46 Ga. 217, 218.

In a case of burglary, 48 Ga. 505, arising under the act declaring that the offense might be committed "in a house which was the place of business of another, where valuable goods, wares or produce or other articles of value were contained or stored," it was held, that in order to sustain the charge, it was not necessary to prove that the house broken into and entered was the place of business used for the purpose of containing or storing the goods alleged to have been stolen; that if the goods were in fact contained or stored in such a house at the time, it was sufficient to support the indictment, and this, although the business carried on in the house was not carried on with or in the articles or goods stolen.

A more flagrant case than that under consideration, or one more satisfactorily established by the proofs to the exclusion of all doubt as to the guilt of the parties accused, has been rarely presented; and that a jury of the vicinage, composed of "upright and intelligent men," should have been willing by their verdict to ask the mercy of the court in inflicting punishment upon an organized band of thieves, who came from a distant State for the purpose of preying upon the property and violating the right of their fellow citizens, is no slight tribute to the persuasive powers, the skill and eloquence of the able counsel who conducted their defense. In concluding this opinion, it is only proper to acknowledge the obligations we are under to H. Clay Foster, Esq., for the copious and admirably arranged brief furnished for the State.

Judgment affirmed.

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ACTION.

See BAILMENT, 688.

AGENCY.

To sell—agent selling as his own.] The plaintiff consigned a piano to B. and E., a firm, to be sold for cash. With the assent of E., B. removed it to his house and used it there for nine or ten months, when he sold it, as belonging to himself or his wife, to the defendant, who paid him a fair price, and purchased in good faith. *Held*, that the plaintiff could not recover the piano. *Dias v. Chickering* (84 Md. 348), 770.

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APPEAL.

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Authority to delegate employment.] A client is not liable for costs made by an attorney employed by his attorney. *Antrobus v. Sherman* (65 Iowa, 230), 7.

AUCTIONEER.

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Action for injury to thing bailed.] The borrower of a painting cannot maintain an action for its destruction while in the possession of a carrier for transportation. *Lockhart v. Western and Atlantic Railroad* (73 Ga. 492), 888.

BANKS.

1. **Cashier — certifying certificate of deposit to himself.]** A certificate of deposit made by the cashier of a bank to himself is void on its face and confers no rights on the purchaser. *Lee v. Smith* (84 Mo. 804), 101.
2. **Check "for deposit"—certification—garnishment.]** A bank receiving from a customer a check on another bank indorsed "for deposit," and procuring it to be certified by the drawee, becomes at once liable to the depositor, as for money had and received, and that liability may be reached by garnishment. *National Commercial Bank v. Miller* (77 Ala. 168), 50.
3. **Draft — remedy of payee.]** An unaccepted sight draft on a bank does not operate as an assignment of the fund, and in the insolvency of the drawer the payee must share *pro rata* with other creditors. *Gammel v. Carmer* (55 Mich. 201), 363.
4. **Savings — unauthorized payments.]** In a pass-book issued by a savings bank to a depositor was a printed by-law, as follows: "All payments made by the bank upon the presentation of the pass-book, and duly entered therein, will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book." *Held*, that this did not authorize a payment to a stranger whose only evidence of authority to receive it was the possession of the pass-book. *Smith v. Brooklyn Savings Bank* (101 N. Y. 58), 653.

BASTARDY.

Liability of natural father for support after mother's marriage.] The natural father of an illegitimate child cannot be held for its support, if the mother, during the pregnancy, marries another man who has full knowledge of her pregnancy. *Miller v. Anderson* (43 Ohio St. 473), 823.

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See CRIMINAL LAW, 48.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BOND.

Conditional delivery in blank — alteration by principal.] One who executes as surety a bond in blank, and intrusts it to his principal to be filled in and delivered, is bound by the instrument as delivered to the obligee, although the principal before delivery, inserts a larger penal sum

BOND — Continued.

than that agreed upon between him and the surety, the obligee having no notice, from the face of the bond or otherwise, of the unauthorized act of the principal. *White v. Duggan* (140 Mass. 18), 487.

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See EMINENT DOMAIN, 804.

CARRIER.

1. Ejection of passenger for non-payment of fare — offer to pay.] A railway passenger presenting an invalid ticket and refusing to pay his fare, the conductor proceeded forcibly to eject him from the car at a crossing of another railroad, where the train had stopped for a moment in compliance with a statute, and where passengers were in the habit of getting on and off. The passenger resisted, and twice during the struggle he offered to pay the fare, but it was refused, and he was put off. *Held*, that the ejection was lawful. *Pease v. Delaware, Lackawanna and Western Railroad Company* (101 N. Y. 367), 699.
2. Liability pending transfer of freight to another carrier.] If a common carrier of freight to be transferred to another carrier merely stores it in a warehouse of its own, whence the other is in the habit of taking it at its convenience, and the freight while so stored is destroyed, the first carrier is liable for its value. *Condon v. Marquette, etc., R. Co.* (55 Mich. 218), 367.
3. Passenger — baggage accepted before purchase of ticket.] A railway company whose baggageman accepts baggage from an intending passenger before his purchase of a ticket, contrary to the rule of the company, is liable for its loss without regard to that fact. *Lake Shore and Mich. So. R. Co. v. Foster* (104 Ind. 293), 819.
4. Railroad — negligence — person riding free with stock.] The owner of horses shipped them for transportation on the defendant railroad. By oral agreement with the defendant's station agent one person was to be allowed to ride free in the car with them to take care of them, and the plaintiff's intestate so rode to the knowledge of the conductor. While so riding he was killed by the gross negligence of the defendant, but owing to his position in the car. It was the custom of the defendant to allow one person to ride free in the car with stock to take care of it, and to exact a written contract from the owner waiving certain liabilities and conditioned that the person so riding should assume his own risk of personal injury, and to require such person to indorse the contract. In this case, after the accident and before the plaintiff's death, the owner and the agent executed such a contract and signed the name of the plaintiff's intestate on the back. *Held*, that the company was liable in damages. *Larson v. Chicago, St. Paul, Minneapolis and Omaha Railroad Company* (64 Wis. 447), 684.
5. Stage-coach — negligence — evidence.] In case of injury to a passenger by the overturning of a stage-coach, *held*, (1) that the passenger was not necessarily negligent in having his arm outside the window; (2) that the overturning was *prima facie* proof of the owner's negligence; (3) that evi-

CARRIER — Continued.

dence of the driver's want of skill before and after the accident was competent. *Sanderson v. Frazier* (8 Colo. 79), 544.

See DAMAGES, 238; RAILROADS, 846.

CERTIFICATE OF DEPOSIT.

See BANKS, 101.

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See PAYMENT, 278, 800.

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See DEED, 468.

CONFLICT OF LAW.

Negligence causing death.] An administrator appointed in Missouri cannot maintain an action there for death of his intestate in Kansas, such action being allowed by the statute of Kansas but not by that of Missouri. *Vawter v. Missouri Pac. R. Co.* (84 Mo. 679), 105.

See JURISDICTION, 89.

CONSTITUTIONAL LAW.

1. **Change of corporate charter.]** An irrevocable railroad charter gave the power to condemn lands, and provided for an appeal by the land-owner to a certain court. *Held*, that a general statute substituting another court to which such appeal was to be made was constitutional. *United Companies v. Weldon* (47 N. J. Law, 59), 114.
2. **General statute.]** A statute prohibiting the removal of police officers in cities, for political reasons, or for other certain prescribed causes, and prescribing a mode of trial for all officers, is general and valid. *Fitzgerald v. New Brunswick* (47 N. J. Law, 479), 182.
3. **Prosecution by information.]** A statute requiring all criminal prosecutions to be commenced by information is inconsistent with the constitutional provision that "until otherwise provided by law" they shall be commenced by indictment. *In re Lowrie* (8 Colo. 499), 558.
4. **Statute authorizing citizen to have nuisance prohibited.]** A statute, authorizing any citizen of a county where a place for the unlawful sale of intoxicating liquor is kept, to maintain an action to prohibit and abate it as a nuisance, is constitutional. *Littleton v. Frits* (65 Iowa, 488), 19.

See ELECTIONS, 832.

CONTEMPT.

Juror going to see locality in question.] During a trial for assault with intent to kill, one of the jurors, without permission, went alone to the premises where the assault was committed, for the purpose of acquainting himself with them. *Held* not a contempt. *People v. Court of Oyer and Terminer* (101 N. Y. 245), 691.

CONTRACT.

1. **Consideration — validity.]** A contract to furnish plaintiff the trade of miners and workmen in consideration that defendant shall receive eight per cent on all such sales is valid, not in restraint of trade, nor immoral nor contrary to law. *George v. East Tennessee Coal Co.* (15 Lea, 455), 425.

CONTRACT — *Continued.*

2. **Of sale — successive deliveries — breach.]** On a contract for sale of goods by successive deliveries and payments, a default in respect to one or more will not discharge the other party unless it is evident that the defaulting party intends no longer to fulfill. *Blackburn v. Reilly* (47 N. J. Law, 290), 159.
3. **To abandon proceeding to open highway — public policy.]** An agreement to abandon a proceeding which one has commenced to establish a highway, in consideration of money to be paid, is void. *Jacobs v. Tobiasson* (65 Iowa, 245), 9.
4. **To break a will — public policy.]** An agreement between the father and grandfather of an infant legatee, on one side, and an heir-at-law, not a legatee, on the other, that the latter should resist and the former should not insist on probate, and if the will should be set aside the heir should pay the infant the amount of his legacy, the object being to defeat a residuary legatee, is void. *Gray v. McReynolds* (65 Iowa, 461), 16.
5. **To reduce rent — consideration.]** An executed oral agreement by a lessee with his lessor to take a partner in his business for three years, and borrow money and put into the business, provided the lessor would reduce the rent already reserved, forms a good consideration for the lessor's promise to reduce the rent. *Hastings v. Lovejoy* (140 Mass. 261), 462.
6. **To "satisfaction."]** The plaintiff contracted to alter boilers for the defendant, the price to be paid as soon as the defendant was "satisfied that the boilers as changed are a success." The work was done and the defendant used the boilers without complaint. *Held*, that an unfounded allegation of dissatisfaction was no defense to an action for the price. *Duplex Safety Boiler Company v. Garden* (101 N. Y. 387), 709.
7. **To take into employment in consideration of release of damages — defense of incompetency.]** In settlement of a suit for personal injuries, the defendant railroad company agreed to employ the plaintiff as a baggagemaster and express messenger. In an action for breach of that contract, the defendant set up that the plaintiff was incompetent. *Held*, (1) Expert opinions on that question are inadmissible. (2) The defendant was bound to afford him a reasonable opportunity to acquire the requisite knowledge and skill. *Moore v. Chicago, Quincy & Burlington Railway Company* (65 Iowa, 505), 26.
8. **Subscription — revocation by death.]** A written offer to subscribe to the capital stock of a railroad company, provided it shall build along a certain route, is revoked by the death of the party offering before delivery to and acceptance by the company. *Wallace v. Townsend* (43 Ohio St. 537), 829.

See RAILROADS, 97; SALE, 619.

CONTRACTOR.

See MASTER AND SERVANT, 148, 708.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATION.

1. **Acceptance of charter—requisites.]** A charter was granted to a corporation by the legislature of North Carolina. The corporation named held their first meeting in Baltimore, Maryland, and accepted the charter. *Held*, an invalid acceptance, and that the corporation had no legal existence. *Smith v. Silver Valley Mining Company* (64 Md. 85), 760.
 2. **Charitable—conditions of admission—remedy for fraud upon.]** The plaintiff was a charitable incorporated asylum for aged persons, one of the conditions of admission to which was that in addition to a certain entrance fee, the applicant should transfer all his property to the asylum. Z., knowing the conditions, paid his entrance fee and declared in writing that he had no other property, and was received without executing any transfer. He remained until his death, when it was discovered that at the time of his entrance he had \$1 200. *Held*, that the plaintiff could recover it from his administrator. *General German Aged People's Home of Baltimore City v. Hammerbacker* (64 Md. 595), 782.
 3. **Tort—ultra vires.]** *New York, Lake Erie and Western Railway Company v. Haring* (47 N. J. Law, 137), 123.
- Fraud by directors.]** See FRAUD, 84.

See OFFICER, 281.

CRIMINAL LAW.

1. **Bigamy—evidence of first marriage—proof of continuance.]** On a prosecution for bigamy the first marriage may be established by the defendant's admissions. Positive evidence that the former husband or wife was alive at the time of the second marriage is not essential. The fact may be made out by presumption and circumstances. *Parker v. State* (77 Ala. 47), 43.
2. **Burglary—entry.]** Pushing up a trap-door in a floor a foot is sufficient to constitute a burglarious entry. *Harrison v. State* (20 Tex. Ct. App. 387), 529.
3. **Chance verdict.]** On a trial for murder, the jurors agreed that the term of imprisonment to be inflicted should be ascertained by dividing the aggregate number of years voted for by twelve. The result was fifteen years and nine months. Then it was agreed to add three months as it was not customary to return verdicts for fractions of years; and the verdict was returned for sixteen years. *Held*, a chance verdict, and set aside. *Williams v. State* (15 Lea, 120), 404.
4. **Evidence—of good character.]** It is error to charge the jury in a criminal case that evidence of the defendant's good character can only be considered where the other evidence is doubtful, and that it is not of the slightest consequence when that evidence is strong, and the guilt of the defendant is impressed on the minds of the jury. *Commonwealth v. Leonard* (140 Mass. 473), 485.
5. **— of physical examination of defendant.]** On a question of foot-prints and an alleged peculiar structure of the defendant's feet, evidence on the part of the defendant, by witnesses who had recently or immediately before examined his feet, is competent. *Lipes v. State* (15 Lea, 125), 402.
6. **False pretenses.]** The defendant had for a year bought goods of the prosecutor on credit, upon the faith of his ownership of a grocery and

CRIMINAL LAW — Continued.

bakery. He secretly transferred the establishment to his wife and step-daughter in payment of a debt he owed them. Immediately thereafter his wife and father-in-law purchased goods of the prosecutor and others, having them charged to the defendant, the defendant not being present. The prosecutor did not know of the transfer, and gave the credit on the faith of continued ownership. *Held*, that the defendant was not guilty of swindling. *Blum v. State* (20 Tex. Ct. App. 578), 580.

7. **Forgery — capacity to deceive.]** An order written dimly in pencil, asking the person addressed to send by the bearer, the defendant, “\$450 cents,” and signed by a name which appears to be G. W. McGowe, has the capacity to deceive, and is sufficient to support an indictment for forgery, with the additional averments that the amount called for was intended for \$4.50, and that the name signed to it meant G. W. McGowen. *Buysinger v. State* (77 Ala. 63), 46.
8. **Former jeopardy — postponement after impanelling of jury and plea.]** A jury was impanelled and sworn, the indictment was read, and the prisoner pleaded not guilty. Then the State’s attorney moved to postpone till a later day of the same term, on the ground that his witnesses were not in court. The prisoner objected, but the motion was granted and the jury discharged. *Held*, that the prisoner was in jeopardy, and could not again be put on trial even at the same term. *Pizano v. State* (20 Tex. Ct. App. 189), 511.
9. **Homicide — insanity.]** There is no grade of insanity sufficient to acquit of murder but not of manslaughter. *United States v. Lee* (4 Mackey, 489), 298.
10. **— evidence — letters of prisoner’s wife.]** On a trial of a man for murder of his wife, the prosecution having given proof of the conduct and expressions of the wife to show that their relations were unpleasant, the prisoner may rebut it by letters of the wife to a third person, written from three to five months before her death. *State v. Leabo* (84 Mo. 168), 91.
11. **Juror.]** One who is exempt from jury duty may waive his privilege and legally sit as a juror. *United States v. Lee* (4 Mackey, 489), 298.
12. **Incest — step-father and step-daughter.]** Incest between step-father and step-daughter cannot be committed after the death of the step-daughter’s mother. *Johnson v. State* (20 Tex. Ct. App. 609), 585.
13. **Larceny from the house.]** A person having money of his own in a satchel went into the banking-house of another, and temporarily deposited it upon the counter, and while standing within about two feet of it, another person called his attention away, and a third abstracted money from the satchel. *Held*, larceny from the house. *Simmons v. State* (73 Ga. 609), 885.
14. **Obstructing railway.]** Where defendant placed obstructions on a railway, for the purpose of getting a reward from the company for notifying them of the obstruction, and signaled and stopped the train before it struck the obstruction, *held*, that he was guilty of willfully and maliciously putting an obstruction on the track. *Crawford v. State* (15 Lea, 343), 423.

CRIMINAL LAW.—*Continued.*

16. **Same act punishable under general law and ordinance.]** A general statute prohibited keeping open tippling houses on Sunday. Subsequently a city charter gave the city "exclusive power to license, tax, restrain, prohibit and suppress tippling houses" in the city. The city enacted an ordinance prohibiting the keeping open of any place for the sale of intoxicating liquors "between midnight and 5 o'clock, A. M., of the day following." The defendant was convicted under the statute of keeping open a tippling house on Sunday in that city. *Held*, error. *Huffsmith v. People* (8 Colo. 175), 550.

Right of proviso to property on person.] See ATTACHMENT, 36.

DAMAGES.

1. **Carrier — wrongful expulsion.]** Where a conductor of a railway company, acting under his instructions, refuses to accept a ticket issued by another company as agent of the former, and demands full fare, the passenger, if he refuses to leave, cannot recover for the necessary force used by the conductor in putting him off. *Pennsylvania Railroad Company v. Connell* (112 Ill. 295), 238.
2. **Measure — coal mined by mistake.]** In a suit to charge defendant with the value of coal mined by him on the plaintiff's land, where the trespass is unintentional, the measure of damages is the value of the coal in the bed, with the incidental injury to the land. *Coal Creek Mining and Manuf. Co. v. Moses* (15 Lea, 300), 415.
3. **Prospective — evidence.]** The defendant agreed that if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of his agent about to be made, for every fifty machines so sold he should have the sole agency for the sale of said machines in that locality, and agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines to persons in different localities in Mexico under an agreement that the purchaser should be the sole agent for that locality. One of the orders defendant filled, the other it refused, and it refused to fill further orders from plaintiffs or their agents, and repudiated the contract. *Held*, that plaintiffs were not restricted to the damages sustained by reason of the refusal of the defendant to fill the orders actually given, but were entitled to recover such damages as they could show they had sustained by a total breach of the contract. Plaintiffs offered to prove that subsequent to the repudiation of the agreement, defendant established agencies in Mexico, and to show the number of machines sold through them. This was excluded. *Held*, error. But *held*, that the opinions of witnesses as to the value of the agreement, the profits which it or any agency established in pursuance of it could produce, the damages realized, and as to the number of machines they could have sold, were properly excluded. *Wakeman v. Wheeler & Wilson Manuf. Co.* (101 N. Y. 205), 676.
4. **— nuisance.]** *Uline v. New York Cent. and Hudson River Railroad Co.*, 661.

See SCHOOLS.

DEED.

1. **Appurtenances — grant of spring — overhanging shade tree.]** *Lucas v. Bishop* (15 Lea, 165), 410.
2. **Condition to keep passageway open — bay windows.]** A bond for a deed of land given by the Commonwealth described the land as bounded by "a passageway sixteen feet wide," and referred to a plan showing a system of streets covering an extensive territory, with passageways for the accommodation of the houses on two streets, and for access to their rear entrances. The bond further provided, that buildings to be erected on the premises should not be used for stables or mechanical or manufacturing purposes, and that "a passageway sixteen feet wide is to be laid out in the rear of said premises, the same to be filled in by the Commonwealth, and to be kept open and maintained by the abutters in common." The obligee built a house up to the line of the passageway, and built bay windows from a point eight feet above the sidewalk, and extending from three to four feet into the passageway, to the top of his house, six stories high. *Held*, upon an information in equity by the attorney-general, that the passageway was to be kept open to the sky throughout the entire width and length, and that the abutters on the passageway between two cross streets could not, by agreement among themselves, discontinue so much of the passageway. *Attorney General v. Williams* (140 Mass. 329), 468.
3. **In blank — agency to fill and deliver.]** A mortgagee of land executed an assignment of the mortgage, in blank as to the assignee, and orally authorized his son to find a purchaser, write in his name as grantee, and deliver the assignment. The son did so, the assignee not knowing that the son was acting as agent in any respect except to deliver the assignment. *Held* that the assignment was valid. *Phelps v. Sullivan* (140 Mass. 86), 442.
4. **Quit-claim — recording act.]** A recorded quit-claim deed takes precedence of a prior unrecorded warranty deed. *Cutler v. James* (64 Wis. 173), 608.

DELIVERY.

See BOND, 437, SURETY, 867.

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See MARRIAGE, 309.

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See MARRIAGE; WILL, 507.

DURESS.

Lawful process — no cause of action.] One who is imprisoned under lawful process on an unfounded cause of action cannot avoid a contract made to procure his release on the ground of duress. *Clark v. Turnbull* (47 N. J. Law, 265), 157

EASEMENT.

See PARTY-WALL, 1

EJECTMENT.

By cestui que trust — title of trustee.] In an action of ejectment, the plaintiffs claimed under a chain of title terminating in a trust deed, which provided that the trustee should hold the property for the sole and separate use of the plaintiffs for and during their natural lives, and after their deaths, to such children as they might leave, share and share alike, and in case they died leaving no such children living, then over to certain designated persons. When the deed was made, the plaintiffs were minors, but before the suit was brought, they had attained their majority. The trustee had died, and no successor had been appointed. The plaintiffs had never been in possession. *Held*, that the plaintiff was entitled to recover. *Glover v. Stamps* (73 Ga. 209), 870

ELECTIONS.

1. **Action for erasing name of voter.]** One whose name is wrongfully erased from the register of voters may maintain an action against the selectmen of the town therefor. *Larned v. Wheeler* (140 Mass. 390), 483.
2. **Registration — constitutionality.]** A statute relating to elections required registration as a pre-requisite to the right of voting; allowed voters only seven days within the year in which to register and correct the registration; made no provision for registration thereafter, nor for any excuse for not registering in time, nor any means whereby absentees could be subsequently registered. *Held*, unreasonable and invalid. *Daggett v. Hudson* (43 Ohio St. 548), 832

EMINENT DOMAIN.

1. **Canal — abandonment.]** Where land is condemned for the right of way of a canal, and embankments and structures are erected to protect a riparian owner's land, and are maintained until the statute of limitations has run, on the abandonment of the canal the land owner is entitled to have the embankment and structures remain. *Burk v. Simonson* (104 Ind. 173), 804.
2. **Condemning temporary use.]** A railway company, authorized to condemn lands for a right of way, cannot condemn a temporary use, nor a use contingent on the happening of a future event. *Hibernia Railroad Company v. DeCamp* (47 N. J. Law, 518), 197.

ESTOPPEL.

See PARENT AND CHILD, 581.

EVIDENCE.

1. **Bestardy — resemblance of child to defendant.]** In bastardy proceedings the child may not be exhibited to the jury to show its resemblance to the defendant, nor may counsel draw attention to, and comment on the resemblance. *Hanawalt v. State* (64 Wis. 84), 588.
2. **Cross-examination — impeaching questions.]** On trial for murder a witness was asked, under objection, if he had ever been confined in jail. The court instructed the witness that he was not bound to answer, and he refused to answer. *Held*, that there was no error in allowing the question to be put. *Smith v. State* (64 Md. 25), 752.

EVIDENCE — *Continued.*

3. **Declarations — expressions of pain.]** In an action for damages for a personal injury, evidence of expressions by the injured person of pain and sickness and declarations as to its seat, at the time of or subsequent to the occurring of the injury, and without regard to whom made, is competent. *Cleveland v. Newell* (104 Ind. 264), 312.
4. **Disclosure to physician — declarations.]** On a prosecution for abortion, a physician, who after the commission of the crime was selected by the public prosecutor to attend and examine the woman, and did attend and examine her with her consent, was allowed to testify, as a witness for the prosecution, to his opinion, founded on his observation of the woman and her narration of the circumstances, that an abortion had been committed. The woman was alive at the time of the trial. *Held*, (1) that the disclosure was prohibited by the statute; (2) that it was incompetent, because a narration of past events and not part of the *res gesta*. *People v. Murphy* (101 N. Y. 126), 661
5. **Memorandum to refresh memory.]** Where a witness swears that he made an entry of certain payments in dispute in a book, at the time, he may refresh his memory by a copy thereof recently made by himself. *Galloway v. Varner* (77 Ala. 541), 78.
6. **Negligence — communication of fire by railroad — usage — burden of proof.]** In an action against a railroad company for negligently setting fire to the plaintiff's premises, the plaintiff only proved that the fire originated near the track, and shortly after the passing of a train, and that recently the same engine had been seen to drop glowing cinders and to start other fires. The defendant offered to prove that it was an old custom of the farmers in that vicinity to set fire annually to the leaves and underbrush at that season to improve the pasturage. *Held*, (1) that the plaintiff's evidence was competent and sufficient to warrant a finding of negligence; (2) that the defendant's offer was incompetent. *Green Ridge Railroad Company v. Brinkman* (64 Md. 52), 755.
7. **Opinion — sufficiency of fence.]** On the question of the sufficiency of a fence to turn stock, non-expert witnesses may not give their opinion. *Railroad Company v. Shultz* (43 Ohio St. 270), 805.

Expert — to prove competency of servant.] See CONTRACT, 26.

See MALICIOUS PROSECUTION, 170.

EXECUTOR AND ADMINISTRATOR.

1. **Acceptance of draft — personal liability.]** A draft was drawn on "A. S., executor," for a certain sum at a specified date, with interest, and containing the direction to "charge the amount against me and of my mother's estate." The defendant accepted, simply adding the word "executor" to his signature. *Held*, that he was liable individually. *Schmittler v. Simon* (101 N. Y. 554), 787.
2. **Foreign — power over assets.]** A mortgage upon real property in Michigan belonging to a person who dies in another State and whose estate is in course of regular and valid local administration in Michigan, may not

EXECUTOR AND ADMINISTRATOR — Continued.

be sold by a foreign administrator to strangers; the title thereto is in the local administrator for purposes of administration, and he alone can sue on it or assign or discharge it of record. *Reynolds v. McMullen* (55 Mich. 568), 886.

3. **Trust for charity in discretion — sale of land — liability of sureties.]** A will gave the residue of the estate to the executor, "to be disposed of by him for such charitable purposes as he shall think proper." *Held*, that his sureties were liable for so much of the estate as was received by him and not so disposed of. Upon an executor's bond conditioned to account for the proceeds of all his real estate that may be sold for the payment of his debts and legacies, "the sureties are not liable for the proceeds of land sold by authority of the will, but not needed for the payment of debts and specific legacies." *White v. Ditson* (140 Mass. 351), 473.

See CONFLICT OF LAWS.

FALSE IMPRISONMENT.

- Void warrant.]** In an action for false imprisonment, a warrant void on its face is no defense to one on whose complaint the warrant was issued. *Gelzenleuchter v. Niemeyer* (64 Wis. 316), 616.

FALSE PRETENSES.

See CRIMINAL LAW, 530.

FORGERY.

See CRIMINAL LAW, 46.

FRAUD.

1. **By directors of corporation — misrepresentation of character of bonds.]** Directors of a corporation placing bonds in the hands of an agent for sale, and falsely and knowingly causing them to be indorsed "first mortgage bonds," are liable in damages to purchasers in good faith relying on such indorsement and injured by the misrepresentation. *Clark v. Edgar* (84 Mo. 106), 84.
2. **In procuring subscription to railway stock.]** False representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route, as to the intended location, and the time within which it will be completed to a particular place, are not fraudulent, nor available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive. *Montgomery Southern Railway Company v. Matthews* (77 Ala. 357), 60.
3. **Sale — inadequate price.]** Where one sold and another bought a diamond worth \$700 for one dollar, the stone being open to the inspection of both, both being ignorant of its real value, and supposing the price a fair one, the sale cannot be rescinded. *Wood v. Boynton* (64 Wis. 265), 610.

See CORPORATION, 782.

GARNISHMENT.

See BANK, 50.

GIFT.

Causa mortis.] G. was an old man having daughters by a first wife, and a son by her with whom he boarded; he owned a farm and stock thereon, but most of his estate consisted of promissory notes; before his last sickness he had expressed a desire "that his children should have his notes and his son should have his farm;" on the day of his death, in the presence of a daughter's husband, herself and a sister, G. said to the daughter: "My notes are in a little box on the bureau there; I want you to take them and divide them equally among you children." He told her to get the key to the box, and she got the key and tried it in the box, and gave the key to her husband for safe-keeping. After his death, intestate, she took the box, but did not divide the notes, but returned them to the administrator, and they were appraised and held as part of the estate. *Held*, that there was no sufficient delivery to constitute a gift *causa mortis*. *Gano v. Fisk* (43 Ohio St. 462), 819.

HOMICIDE.

See CRIMINAL LAW, 298.

HOSPITAL.

See NEGLIGENCE, 486

INCEST.

See CRIMINAL LAW, 535.

INFANCY.

Contract by father for son.] No action lies against a father on a contract made by him in the name and behalf of his minor son with his knowledge and assent. *Patterson v. Lippincott* (47 N. J. Law, 457), 178.

INFORMATION.

See CRIMINAL LAW, 558.

INJUNCTION.

See RAILROADS, 846.

INSANITY.

Adjudication of — conflicting judgment — payment to committee — statute of limitations.] On the 19th of February, 1869, plaintiff, at the direction of John Banker, deposited money for him in defendant bank to plaintiff's own credit, and drew checks thereon and delivered them to Banker, who transferred them to Ellen Houghtaling in consideration of her promise to marry him. On the twenty-third of February, proceedings were commenced against Banker to declare him a lunatic, and the bank was enjoined from paying the deposit. On the thirty-first of March, Banker was

INSANITY — *Continued.*

adjudged a lunatic and to have been so for six months, and the bank was ordered to pay the deposit to his committee, and did so on the fourteenth of April. The checks were presented and payment refused in March and August. Banker married Ellen Houghtaling on the eighth of March, and died on the fourteenth of September, 1869. His committee brought an action to set aside the marriage on the ground of lunacy, but it was adjudged that Banker was not of unsound mind at the time of his marriage, had lucid intervals afterward in which he recognized the marriage, and was of unsound mind when he died. In an action on the checks, *held*, (1) that the payment by the bank to the committee was valid; (2) the judgment did not affect the previous adjudication of lunacy; (3) the cause of action was barred by the statute of limitations. *Viets v. Union National Bank* (101 N. Y. 568), 743.

INSURANCE.

1. **Accident — injury in affray.]** An injury sustained by one in an affray, without his fault, is an accident within the meaning of an insurance contract. *Supreme Council of Order of Chosen Friends v. Garrigue* (104 Ind. 133), 298.
2. **Bowling alley — expired license.]** The owner of a bowling alley and pool-table procured an insurance against fire on the same and the other articles used in connection therewith, on the 15th of March, 1883. The policy was conditioned to be void "if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law." At the time the policy was issued he was duly licensed to keep such alley and table, but the license expired on the 1st day of May, 1883. He continued the business, without license, until the last week in June, 1883, when he discontinued it. A loss by fire occurred on the 6th of August, 1883. *Held*, that he might recover the policy. *Hinckley v. Germania Fire Ins. Co.* (140 Mass. 88), 445.
3. **"Contained in"—wearing apparel.]** A seal-skin garment insured against fire by a policy describing it as "contained in" a dwelling-house, was burned while at a furrier's shop for repairs. *Held*, that the insurer was liable, although the risk was greater at the shop than at the house. *Noyes v. North-western National Insurance Company* (64 Wis. 415), 631.
4. **Husband for wife — right to.]** An insurance on the life of a husband was payable to his wife or her legal representatives. The husband paid the premiums, and he had the right to change the beneficiary by consent of the insurers. The wife died, and subsequently the husband. *Held*, that the insurance money belonged to the husband's estate. *Washington Beneficial Endowment Association v. Wood* (4 Mackey, 19), 251.
5. **Location of goods.]** Goods described as contained in a dwelling-house were insured against fire, and were burned while in a barn on the same premises, to which they had been removed to the knowledge of the company. *Held*, that no action would lie. *English v. Franklin Fire Ins. Co. of Phila.* (55 Mich. 278), 377.

INSURANCE — *Continued.*

6. **Loss payable to mortgagee.]** Where a fire insurance policy is taken by a mortgagor in his own name, conditioned that the loss shall be payable to the mortgagee, to the extent of his interest, the mortgagee may maintain an action on the policy although the loss does not exceed the amount due on his mortgage. *Fire Insurance Companies v. Felrath* (77 Ala. 194), 58.
7. **Payment of premiums — forfeiture.]** A railway brakeman, insured against accident, gave the insurers a written order on his company for the premiums as they fell due, which they delivered to the railroad company. That company neglected to pay one installment, and while it was in arrear the brakeman was killed by accident. *Held*, that the policy was not forfeited, and the beneficiary might recover, notwithstanding it provided that there could be no liability for an injury occurring while any premium was in arrear. *Lyon v. Travellers' Ins. Co. of Hartford, Conn.* (55 Mich. 141), 354.
8. **Vacancy.]** A house was insured while occupied by a tenant. The tenant moved out and the landlord at once moved his own goods in and began to clean up, meaning to live there himself, but the next day went away for three days' absence. While cleaning the house he ate and slept at a neighboring house, and after a few days went off again on a business trip. While gone the house was burned. *Held*, that the policy had not become void on the ground of vacancy. *Shackelton v. Sun Fire Office of London, England* (55 Mich. 288), 379.

See LANDLORD AND TENANT, 398; MORTGAGE, 578.

JUDGE.

Personal liability.] See OFFICE AND OFFICER, 65.

JURISDICTION.

Negligence — remedy under statute of another State.] An action may be maintained in Iowa for negligently killing a man in Illinois, the statutes of both States allowing such remedy in substantially the same form. *Morris v. Chicago, Rock Island & Pacific Railway Company* (65 Iowa, 727), 39.

See CONFLICT OF LAWS, 105.

JUROR.

See CONTEMPT, 691; CRIMINAL LAW, 298.

JURY.

Rejection of competent juror — inhabitant of city.] The charter of the defendant city provided that in an action to which the city is a party no person shall be deemed an incompetent juror by reason of his being an inhabitant of the city. In impaneling a jury in this action, the plaintiff, against the defendant's objection, excused twelve jurors drawn on the ground that they were inhabitants and tax payers of the city, and they were set aside. A jury was obtained, and judgment went against the city. *Held*, that the ruling was fatal error. *Hildreth v. City of Troy* (101 N. Y. 234), 686.

LANDLORD AND TENANT.

1. **Holding over — demand of rent.]** A demand of rent by a landlord of a tenant holding over does not convert the tenancy into one from year to year. *Condon v. Barr* (47 N. J. Law, 113), 121.
2. **Implied covenant that premises are habitable.]** There is no implied covenant on the leasing of a furnished house that the premises are habitable. *Fisher v. Lighthull* (4 Mackey, 82), 258.
3. **Insurance — rebuilding.]** During a lease of real estate, providing that if the buildings, or any of them, be destroyed by fire, the lessees were to rebuild at their own expense, fire insurance policies on the buildings were issued to the lessors, but made payable to the lessees, who paid the premiums, and the insured property was destroyed by fire during the term, when the lessees collected the insurance money but declined to rebuild. *Held*, (1) that the lessors were entitled to recover of the lessees the amount collected by them on the policies; (2) that the lessees were not entitled to an allowance out of the insurance money for the loss of the use of the buildings for the balance of the term after the destruction of the property by fire. *Hayes v. Ferguson* (15 Lea, 1), 398.
4. **Nuisance — liability.]** The defendant leased premises to a tenant, who by permission of the city constructed a vault under the sidewalk in front, with a coal-hole, in a proper and useful manner. By the wrongful act of a stranger, the stone supporting the cover of the hole was broken, and the cover turning when the plaintiff stepped on it, he fell and was injured. The defendant had no knowledge or notice of the defect. *Held*, that he was not liable. *Wolf v. Kilpatrick* (101 N. Y. 146), 672.
5. **—.]** A nuisance was created by a lessee under a lease by which he had covenanted to keep the premises in repair. This nuisance became injurious to a third person. Subsequently, and on the expiration of the lease, the lease was renewed with like covenants, the landlord not taking actual possession, but knowing of the injury. *Held*, that the landlord was liable for the injury. *Ingersen v. Rankin* (47 N. J. Law, 18), 109.
6. **— injury after surrender.]** A tenant who during his term erected an insecure fence on the leased premises may be liable for an injury by its falling on a passer in the street after his surrender of the premises to the landlord. *Hussey v. Ryan* (64 Md. 426), 772.

LARCENY.

See CRIMINAL LAW, 885.

LEGACY.

See WILL, 607.

LESSOR AND LESSEE.

See LANDLORD AND TENANT.

LIBEL.

1. **Actionable words — “swine.”]** To call a man a “swine” in writing, is libellous. *Solverson v. Peterson* (64 Wis. 198), 607.

LIBEL — Continued.

2. **Privileged communication.]** A railroad company supplied its agents with a list of discharged employees, stating the reasons for discharge. When the reason stated was "stealing," and the charge was unfounded, *held*, a libellous publication. *Bacon v. Mich. Cent. R. Co.* (55 Mich. 224), 372.

LICENSE.

See MUNICIPAL CORPORATION, 516; STATUTE OF FRAUDS, 243.

MALICIOUS PROSECUTION.

1. **Evidence.]** In an action for malicious prosecution, the defense being that by mistake of the magistrate in drawing the affidavit the defendant was made to charge a different crime from that intended, the defendant may prove that the crime intended to be charged was true according to his belief. *O'Brien v. Frasier* (47 N. J. Law, 349), 170.
2. **— plaintiff's character.]** In an action for malicious prosecution, charging injury to character, the defendant may show the plaintiff's bad reputation in mitigation. *Id.*

MARRIAGE.

1. **Divorce — adultery — connivance.]** A husband suspecting his wife of adultery with a lodger in his house, informed his wife that he was going out of town and should not return that night or until late that night. He did not go out of town, but watched the house in the evening until he saw the lights in his wife's and the lodger's room extinguished, and then secretly entered and surprised them in bed together. This particular act of adultery would not have occurred but for the husband's scheme. *Held*, not a "connivance" by the husband. *Robbins v. Robbins* (140 Mass. 528), 488.
2. **Divorce — custody of children.]** The custody of children having been awarded to the mother on divorce, on the ground that the father was unfit, and the mother having died, the father, on showing his fitness, may recover the children. *Bryan v. Lyon* (104 Ind. 227), 309.
3. **Woman's will — subsequent marriage.]** Where married women have power to make wills as if single, the will of a single woman is not revoked by her subsequent marriage. *Noyes v. Southworth* (55 Mich. 178), 359.

MASTER AND SERVANT.

1. **Contractor — nuisance.]** Defendant employed B., who was engaged in "the roofing and cornice business," to repair the cornice of his hotel, in the city of New York. No price or plan was specified; and the mode of repair and the means to be employed were left entirely to the judgment of B. The employees of B. suspended a ladder from the roof upon which planks were placed to serve as a scaffold. A heavy wind caused one of the planks to fall; and it struck and injured the plaintiff who was passing. Defendant was not in the city during the repairs and had no knowledge of the manner in which they were being done. The building was separated from the sidewalk by an area of fifteen feet wide. *Held*, that the

MASTER AND SERVANT — *Continued.*

- scaffold was not a nuisance, and the defendant was not liable. *Hexamer v. Webb* (101 N. Y. 877), 708.
2. **Duty of railroad as to bridge under repair.]** A railroad company is not liable for the death of a brakeman caused by his falling through a bridge in process of repair, upon which the train had stopped at night. *Keontz v. Chicago, etc., R. Co.* (65 Iowa, 224), 5.
 3. **Fellow servants — contractor's servant.]** The defendant, owning a saw-mill, employed master machinists to repair the water-wheel, and the machinists sent the plaintiff with others to do the work. It was understood between the workmen and the defendant that the mill should be run when they were not working on the wheel. While they were so at work, the defendant's engineer negligently started the wheel, injuring the plaintiff. *Held*, that defendant was not liable. *Ewan v. Lippincott* (47 N. J. Law, 192), 148.
 4. **Negligence — passenger assisting car driver.]** The plaintiff was a passenger on a car of a street railway having but one track, with occasional turn-outs. In turning out to avoid a car coming in the other direction, the car ran beyond the turn-out, and the driver requested the plaintiff to assist him in backing it upon the turn-out. While so engaged he was injured by the negligence of the driver of the other car. *Held*, that the railway company was liable. *Street Railway Company v. Bolton* (43 Ohio St. 224), 803.
 5. **— stevedore.]** A ship-owner is not liable for an injury to his employee by the negligence of a stevedore in loading the vessel. *Rankin v. Merchants and Miners' Transportation Co.* (73 Ga. 229), 874.
 6. **— unsafe machine — contributory negligence.]** The plaintiff was employed to work on a machine of an old pattern, which had not all the safeguards of newer machines. He worked on it for several years and then told the owner's superintendent that it ought to have an additional safeguard. The superintendent promised to attend to it, but it was not furnished, and the plaintiff was required to continue to work with it under threat of being discharged if he refused. He complied and was injured. *Held*, that the master was not liable. *Sweeney v. Berlin and Jones Envelope Company* (101 N. Y. 520), 722.
 7. **Unusual risk.]** As to whether a brakeman can recover against his company for an injury received in consequence of the conductor's managing the locomotive in the engineer's absence, the court were equally divided. *Rodman v. Michigan Cent. R. Co.* (55 Mich. 57), 348.
 8. **Use of hired horse for work not contemplated.]** Where one party lets his team and driver to another, to be used in a certain place and for a certain purpose, and while being used in a different place and for a different purpose, without the bailor's consent, the team is lost without any negligence of the driver, the hirer is responsible therefor. *De Voin v. Michigan Lumber Company* (64 Wis. 616), 649.

See NEGLIGENCE, 126.

MORTGAGE.

1. **Assumption.]** A purchaser of mortgaged lands from the mortgagor, by a deed reciting that he assumes the mortgage, becomes at once personally liable to the mortgagee, and cannot evade this liability by a release from the mortgagor. *Bay v. Williams* (112 Ill. 91), 209
2. **Recording — priority.]** The owner of land mortgaged it to A., and afterward to B., who knew of the earlier mortgage, but recorded his own mortgage first. After both mortgages were recorded, B. assigned his mortgage to C., who had no actual notice of the mortgage to A. *Held*, that C. had precedence. *Morse v. Ross* (140 Mass. 112), 456.
3. **Chattel — conversion by third person — seizure by mortgagee.]** A chattel mortgagor sued a third person for conversion of the mortgaged property. Subsequently the mortgagees seized the property under the mortgage, sold part of it, and transferred another part to the defendant. The mortgagor made a second mortgage of the property pending the action. *Held* (1) that the making of the second mortgage was not an abandonment of the cause of action, but (2) the seizure by the mortgagee should be considered in mitigation of damages. *Dahill v. Booker* (140 Mass. 308), 465.
4. **— increase of animals — bona fide purchaser.]** The increase of domestic animals mortgaged during gestation is not covered by the mortgage as against a *bona fide* incumbrancer thereof acquiring his lien without notice of the facts and after the period of nurture, but one who takes a mortgage thereof merely to secure a pre-existing debt is not a *bona fide* incumbrancer. *Funk v. Paul* (64 Wis. 85), 576.
5. **— insurance of mortgagee's interest — rights as against creditors.]** A mortgagee of chattels insured by a policy payable to him as his interest may appear, is entitled to payment of his claim out of the insurance moneys in case of loss, in preference to other creditors, although the mortgage was not properly filed. *Manson v. Phoenix Insurance Company* (64 Wis. 26), 578.
6. **— sale of mortgagor's interest on execution.]** The interest of a mortgagor in mortgaged chattels in possession of the mortgagee may be levied upon under execution, but they cannot be taken from the mortgagee without an offer to pay the mortgage debt. *Fox v. Cronan* (47 N. J. Law, 493), 190.
7. **—.]** The officer may advertise the interest of the mortgagor for sale, and on the day of sale he may require the mortgagee to expose the property to the view of bidders, and enforce obedience to that duty on the party of the mortgagee by virtue of his writ. *Id.*
8. **—.]** If a sheriff with notice of the mortgagee's claim attaches the entire mortgaged property, and takes it from the mortgagee, and it is subsequently sold by the auditor in attachment, the sheriff is liable to the mortgagee for the mortgage debt. *Id.*

See INSURANCE, 58; PARTNERSHIP, 400.

MUNICIPAL CORPORATION.

1. **Negligence — blasting in street.]** A city is not liable for an injury to a passer in a street caused by the negligence of a contractor in blasting. *Blumb v. City of Kansas* (84 Mo. 112), 87.

MUNICIPAL CORPORATION — *Continued.*

2. — *coasting in streets.*] *Taylor v. Mayor, etc., of Cumberland* (64 Md. 68), 759.
3. — *failure to fence area.*] The law requires all areas in the city of Washington to be protected by railings, with an allowance of four feet for an opening or entrance. The property in question had an area along its entire front, but had no railing. The plaintiff fell into the area and was seriously injured. *Held*, no defense that he fell into the area at a point where the opening or entrance would have been had a railing been erected. *McGill v. District of Columbia* (4 Mackey, 70), 256.
4. — *sewers.*] A city established a system of sewerage, and built a sewer to drain a hitherto undrained district, which proved insufficient to carry off the sewage turned into it, and overflowed upon the plaintiff's land. With knowledge of this the city continued to attach lateral sewers to the main sewer, increasing the injury to the plaintiff's property. *Held*, that the city was liable. *Seifert v. City of Brooklyn* (101 N. Y. 136), 664.
5. *Obstruction in street.*] A horse was frightened at a boulder dug out of the side of a city street and which had lain there several days awaiting removal by a person who had asked for and obtained it for building purposes. *Held*, that the city was not responsible for a consequent injury. *Agnew v. City of Corunna* (55 Mich. 428), 383.
6. *Ordinance — change of salary — estoppel.*] A city charter forbidding any change in the mayor's salary during the term of his office is infringed by an ordinance providing that after the expiration of the term of the then mayor, the mayor should serve without compensation; and a mayor is not estopped from claiming compensation by his declarations during the canvass for the office that if elected he would not claim compensation. *State v. Mayor, etc., of Nashville* (15 Lea, 697), 427.
7. — *hack license.*] An ordinance requiring every owner of a hack to take out a license at \$8 per annum, and pay the cost of numbering the hack, not exceeding twenty-five cents, is valid. *Ex parte Gregory* (20 Tex. Ct. App. 210), 516.
8. *Seating members of council.*] A city council, having exclusive power to judge of the election and qualifications of its members, having once seated a member after an investigation, cannot order a second investigation. *Kendall v. City Council of Camden* (47 N. J. Law, 64), 117.
9. *Title to furniture of engine-house.*] A room in a town fire-engine house had been supplied with furniture for the use of the firemen, purchased by contributions from the town, from citizens and from members of the company, by prize money gained in a contest with another company, and by assessments on the members. The furniture was used for ten years by the succeeding companies, until the members of the existing company removed it, divided it among themselves, and disbanded. The members were appointed by the town engineers. *Held*, that the town could replevy it. *Inhabitants of Brookline v. Sherman* (140 Mass. 1), 434.

See NEGLIGENCE, 175.

MURDER.

See CRIMINAL LAW, 91, 293.

NEGLIGENCE.

1. **Contributory — priority to defendant's.]** The plaintiff in going to his business found a train of cars of the defendant across the street. Having waited some twenty minutes, and the train not moving, he endeavored to cross the track by climbing between the cars, when the train was started without warning or notice, and he was injured. *Held*, that his conduct did not prevent his recovery of damages. *Spencer v. Baltimore, etc., Co.* (4 Mackey, 138), 269.
2. **Contributory negligence.]** A child thirteen years old was injured on a sidewalk by the fall of an insecure fence. *Held*, that she was not negligent in stopping in front of the fence to look at something across the street, although she would not have been hurt if she had not stopped. *Hussey v. Ryan* (64 Md. 426), 772.
3. **Dangerous premises — trustees of hospital.]** A city hospital was maintained by appropriations from the city, donations and fees, and governed by a board of trustees. A person visiting the building on business was injured by reason of the unsafe condition of a stairway, caused by the negligence of the superintendent. *Held*, that the board of trustees was not liable. *Benton v. Trustees of City Hospital* (140 Mass. 13), 436.
4. **Defective machine — injury to visitor on premises.]** Where one goes upon the premises of another without invitation, to obtain employment, and is there injured by a defective machine, not obviously dangerous, he cannot recover from the owner. *Larmore v. Crown Point Iron Company* (101 N. Y. 291), 718.
5. **Fall of shade tree — liability of lot-owner.]** Where a city, by authority of its charter, maintains shade trees on the sidewalks, the owner or occupant of a lot is not impliedly bound to trim them, nor liable for injury to a passer by the fall of a neglected rotten limb. *Weller v. McCormick* (47 N. J. Law, 897), 175.
6. **Imputable — master and servant.]** Where a passenger, by a coach hired with the driver for a particular journey, is injured by a collision with a railroad train, caused by the concurring negligence of the company and the driver, the negligence of the driver is not to be imputed to the passenger. *New York, Lake Erie and Western Railroad Company v. Steinbrenner* (47 N. J. Law, 161), 126.
7. **—]** *Street Railway v. Eadie* (43 Ohio St. 91), 802.
8. **Obstructing sidewalk with skids.]** Defendant, for the purpose of removing merchandise from his store in the city of New York, laid skids from a truck across the sidewalk to the steps. They had been there a few minutes when the plaintiff, coming along the sidewalk, attempted to pass around the skids by the steps, and slipped upon the steps and was injured. *Held*, that defendant was not bound to see that the steps were in an absolutely safe condition for travel, and that the plaintiff was not entitled to recover. *Welsh v. Wilson* (101 N. Y. 254), 698.

NEGLIGENCE — *Continued.*

9. **Proximate cause.**] The plaintiff, a locomotive engineer on defendant's railroad, was injured in reversing his engine, the train having left the track in consequence of a defect in the track. *Held*, that the defect in the track was the proximate cause. *Knapp v. Sioux City, etc., Co.* (65 Iowa, 91), 1.
10. **Storing explosives — corporation.**] A railroad company, storing explosives in a depot building with a defective chimney flue, by reason whereof the building takes fire and there is an explosion injuring the plaintiff's neighboring property, is liable for the injury. *Denver, South Park and Pacific Railroad Company v. Conway* (8 Colo. 1), 537.
- See* CONFLICT OF LAWS, 105; EVIDENCE, 755; JURISDICTION, 89; MASTER AND SERVANT, 5, 649, 722, 759, 803, 874; MUNICIPAL CORPORATION, 87, 256, 664; RAILROADS, 72, 334, 449, 654; TELEGRAPH, 644.

NEGOTIABLE INSTRUMENT.

1. **Alteration—adding witness.**] The affixing of the name of an attesting witness to a promissory note is not a material alteration. *Fuller v. Green* (64 Wis. 159), 600.
2. **Bona fide holder—consideration.**] An agent at Nicaragua having collected a claim for his principal, the plaintiff, at Panama, sent him a draft for the net proceeds, drawn by him on the defendant at New York, which was received by the plaintiff in place of the money collected, and was accepted by the defendant, but was not paid. *Held*, that the plaintiff was a *bona fide* holder for value, and that the defendant was estopped from showing that his acceptance was without consideration or induced by the drawer's fraud. *Houertematts v. Morris* (101 N. Y. 63), 657.
3. **Notice of protest—indorser having made general assignment.**] Notice of protest must be given to an indorser although he has made a general assignment for the benefit of creditors. *House v. Vinton National Bank* (48 Ohio St. 346), 813.
4. **Signing after maturity.**] After a note had fallen due, the defendant signed it under the maker, to induce the payee to hold it and extend the time of payment. *Held*, that he was liable. *Frech v. Yawger* (47 N. J. Law, 157), 128.
5. **Uncertainty of time of payment.**] A note providing that "the payee or his assigns may extend the time of payment from time to time indefinitely, as he or they may see fit," is not negotiable. *Glidden v. Henry* (104 Ind. 278), 816.

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NUISANCE.

See CONSTITUTIONAL LAW, 19; LANDLORD AND TENANT, 109, 672, 772
 MASTER AND SERVANT, 703; TELEGRAPH, 284.

OFFICE AND OFFICER.

1. **Action against intruder for salary.]** The plaintiff, a police commissioner in the city of New York, appointed for a term of six years, was during

OFFICE AND OFFICER — *Continued.*

the term unlawfully removed by the mayor, and the defendant was appointed in his place. The plaintiff was subsequently reinstated by legal proceedings. *Held*, that he was entitled to recover from the defendant the salary paid to him. *Nichols v. McLean* (101 N. Y. 526), 730.

2. Of corporation — personal liability for tort.] The president of an incorporated omnibus company issued an order to the drivers to exclude all colored persons. *Held*, that he was individually liable for the ejection and personal injury of a colored person by a driver. *Peck v. Cooper* (112 Ill. 192), 231.

3. Judge — liability of, for refusing license.] In granting or refusing a license to retail spirituous liquors a probate judge acts ministerially, and an action lies on his official bond if he improperly refuses a license. *Grider v. Tally* (77 Ala. 422), 65.

4. Township trustee — authority to employ physician.] Where a county physician refuses to treat a person in urgent need of medical attendance, a township trustee has authority to employ another, and his declarations concerning payment are competent. *Washburn v. Board of Commissioners of Shelby County* (104 Ind. 321), 332.

See FRAUD, 84; SCHOOLS, 343.

ORDINANCE.

See CRIMINAL LAW, 550; MUNICIPAL CORPORATION, 427, 516.

PARENT AND CHILD.

Allowance to mother for support of child — estoppel.] The parents of a minor child lived in separation, and the mother supported it. Lands were subsequently devised to the child, the child died, and the parents became its sole heirs. *Held*, that the mother was entitled to allowance out of its estate for such support, and she was not estopped by a partition of the lands made on her petition between herself and her husband. *Pierce v. Pierce* (64 Wis. 72), 581.

See BASTARD, 823; INFANCY, 178.

PARTITION.

Right to.] A lessee of lands, the reversion in fee of which is in tenants in common, may upon purchasing a part of the reversion demand a partition even though it will necessarily result in a sale of the premises. *Hill v. Reno* (112 Ill. 154), 222.

PARTNERSHIP.

1. Compensation of one partner for services.] A partner may recover compensation for his services in the firm business if there was an implied agreement therefor. *Emerson v. Durand* (64 Wis. 111), 593.

2. Limited — payment of capital — actual cash.] On the formation of a limited partnership the special partner gave his certified check for \$10,000, the amount of his capital, which was deposited to the credit of the new firm. Afterward, on the same day, the firm gave him their checks on the

PARTNERSHIP — *Continued.*

same bank for some \$7,600, the amount appearing to his credit on the books of a former firm composed of the same members. *Held*, that this was not an actual cash contribution as required by the statute, and the special partner was liable as a general partner. *Lineweaver v. Slagle* (64 Md. 465), 775.

3. **Real estate — held in individual names — Liability for partnership debts—rights of creditors.** Real estate purchased with partnership funds and used by the firm in its business is partnership property, though the legal title is in the names of individual partners; and it is liable to the payment of partnership liabilities in preference to a judgment of a separate creditor, although such partnership liabilities accrued subsequent to the time that the judgment lien attached. *Page v. Thomas* (43 Ohio St. 38), 788.
4. **Settlement — re-payment of capital.]** Where one partner furnishes the capital and the other his services and experience, the profits and losses to be shared equally, the latter partner is not entitled on dissolution to any part of the original capital. *Shea v. Donahue* (15 Lea, 160), 407.
5. **Surviving partner — mortgage.]** A surviving partner of an insolvent firm may not mortgage partnership property to secure one creditor in preference to others. *Anderson v. Norton* (15 Lea, 14), 400.
6. **Taking profits for rent.]** Renting a saloon for a share of the profits of the business does not make the parties partners. *Thayer v. Augustine* (55 Mich. 187), 361.

PARTY WALL.

What constitutes.] The plaintiff bought a lot of the defendant agreeing to erect a building on it, and it was also agreed that when the defendant should build on his own adjacent lot he should construct a stairway to the second story to serve for both buildings and to stand one-half on the land of each party. The plaintiff built his wall twenty inches from the line, and the defendant not only used it for the stairway but for the independent support of his own building. *Held*, that the wall became a party-wall and defendant was liable for one-half the cost. *Molony v. Dixon* (65 Iowa, 136), 1.

PAYMENT.

1. **Of taxes — check not paid.]** A tax payer gave his check for his taxes to the collector. It was not presented for several days, and meantime the bank failed. The bank was insolvent when the check was drawn, and it was not shown that the check would have been paid if promptly presented. *Held*, that the check was not payment. *Koonas v. District of Columbia* (4 Mackey, 839), 278.
2. **Worthless check.]** A check of a third person, given and accepted in payment of a demand, and by both parties supposed to be good, but proving worthless, is not payment. *Fleig v. Sleet* (43 Ohio St. 51), 800.

PHYSICIAN.

See EVIDENCE, 661.

PROCESS.

See DURESS, 157.

PROXIMATE CAUSE

See NEGLIGENCE, 1.

PUBLIC POLICY.

See CONTRACT, 9, 16.

RAILROADS.

1. **Discrimination in freights.]** A railroad company, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agreed to make a rebate on the published tariff on such freights to the prejudice of the other shippers of like freights under the same circumstances. *Held*, (1) contrary to public policy, and void; (2) that an injunction should issue; (3) that although the railroad extended into other States, the injunction should extend to its whole line. *Scofield v. Railway Company* (43 Ohio St. 571), 846.
2. **Frightening horse by firing up engine.]** The plaintiff was driving his horse along a highway parallel and adjacent to a railroad, and the horse was frightened by smoke from the engine of a train coming in the opposite direction, and the plaintiff was injured in consequence. The engine had been necessarily freshly fired up, which increased the smoke. *Held*, that the railroad company was not liable. *Lamb v. Old Colony Railroad Co.* (140 Mass. 79), 449.
3. **Insults to female passenger by strangers at station.]** A railroad company is not liable in damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by intruders at the station while plaintiff was awaiting the arrival of a train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage. *Batton v. South and North Alabama Railroad Company* (77 Ala. 571), 80.
4. **Negligence — dangerous station grounds — lessee — contributory negligence.]** The A. and B. railroad companies owned a railway station and grounds in the city of Montgomery, and leased it to the defendant railroad company. The plaintiff came to Montgomery on the defendant railroad and on alighting at the station, desiring to find a privy, made inquiry of a stranger, who pointed in the direction of a privy erected on the bank of the river, at the further end of the platform, about fifty yards from the station; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff, and sustained serious injuries. The railroad platform was well lighted, and extended from the depot to the river; but there was no light at the privy, and a house intervened between it and the lights on the platform. The plaintiff was acquainted with the locality. *Held*, that he had no cause of action against the A. and B. railroad companies, as to them being a mere stranger; and that he could not recover as against the defendant, because being acquainted with the locality, he was guilty of contributory negligence in attempting to find the privy without further

RAILROADS — *Continued.*

inquiry. *Montgomery and Eufaula Railway Company v. Thompson* (77 Alb. 448), 72.

5. — sounding whistle at overhead highway crossing.] It is not necessarily negligent in a railroad company to sound a locomotive whistle at a point where the railroad crosses a highway by a bridge overhead, although the crossing is known to be one of extraordinary danger, and the sounding of the whistle causes a horse to run away. *Cincinnati, etc., R. Co. v. Gaines* (104 Ind. 526), 834.

6. Statute—"on the track."] A statute makes it the duty of railway locomotive engineers, "on perceiving any obstruction on the track of the road," to use all means to stop the train. *Held*, that this does not apply to an animal running by the side of the track and suddenly springing on the track too late to be avoided. *East Tennessee, Virginia and Georgia Railroad Company v. Bayliss* (77 Ala. 429), 69.

7. Subscription—validity. A subscription for building a railroad was made on the conditions that the road should be completed and put into operation to a certain town by a certain date, and that it should locate a station within a specified distance of the court-house in the town. The road was graded to the town by the appointed time, but was not fully completed until several months later, and in the meantime the company used about a mile of another railroad. *Held*, (1) that the contract for completion was substantially complied with; (2) that the distance of the station from the court-house should be measured in a straight line; (3) that the contract for locating the station was lawful. *Missouri Pacific Railway Company v. Tygard* (84 Mo. 263), 97.

Obstructing.] *See* CRIMINAL LAW, 423.

See CARRIER, 634, 699; EMINENT DOMAIN, 197, TAXATION, 553.

REGISTRATION.

See MORTGAGE, 456.

RIVER.

See WATER AND WATER-COURSE, 410.

SALE.

1. Successive deliveries — several contract.] G. agreed to sell to B. 1,000 cords of wood "to be delivered from G.'s pier in [in Michigan] over the rail of the vessel * * * and to be delivered from time to time to B.'s vessel as wanted during the season of navigation; said wood to be piled as taken from vessel, and to be measured and paid for when piled on B.'s dock in Milwaukee." One cargo of the wood was thus delivered on the vessel and lost with the vessel. *Held*, that the contract as to such cargo became an executed sale, and the title vested at once in B., and the piling and measurement having been rendered impossible, either by B.'s fault or by the act of God, B. was liable for the cargo. *Gill v. Benjamin* (64 Wis. 862), 619.

SALE — *Continued.*

2. **Warranty — delivery to carrier.]** The plaintiff, at Mobile, Alabama, ordered from defendant at Council Bluffs, Iowa, through his agent at Mobile, "choice sugar cured canvassed hams." The plaintiff had no opportunity to inspect them, but they were shipped at Council Bluffs, and payment was demanded and made while they were in transit. *Held*, that the hams were warranted to conform to the order, and defendant was liable for a breach. *Forcheimer v. Stewart* (65 Iowa, 594), 30.

See CONTRACT, 159; FRAUD, 610.

SCHOOLS.

- Superintendent — refusing license.]** A county school superintendent, willfully or corruptly refusing a license to teach to one lawfully entitled, is liable in damages. *Elmore v. Overton* (104 Ind. 548), 343.

SIDEWALK.

See NEGLIGENCE, 698

STATUTE.

1. **"Manufacturer."]** *Evening Journal Association v. State Board of Assessors* (47 N. J. Law, 38), 114.
2. **"Produce dealer."]** A license law provided that "every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts shall be regarded as a produce dealer," and that "no additional license shall be required from produce dealers for selling meat" *Held*, that butter and eggs are "produce" within the statute, but one who sells meats alone is not a produce dealer. *District of Columbia v. Oyster* (4 Mackey, 285), 275.
3. **"Use and operation of a railway."]** Wiping locomotive engines, opening and closing doors of an engine-house, and removing snow from a turntable and the tracks, do not pertain to the operation of a railroad," although turning the turn-table does *Malone v. Burlington, Cedar Rapids and Northern Railway Company* (65 Iowa, 417), 11.
4. **"Vacation."]** An adjournment of court for thirty-two days is to be regarded as "vacation." *Conkling v. Ridgley & Co.* (112 Ill. 36), 204.

See CONSTITUTIONAL LAW, 182.

STATUTE OF FRAUDS.

1. **License — part performance.]** A mere oral license to construct a railway track over the land of another, as distinguished from an oral agreement of sale of the right of way, cannot be enforced in equity, even after the expenditure of a large sum of money in constructing the road on the faith of it. *St. Louis National Stock Yards v. Wiggins Ferry Company* (112 Ill. 384), 243.
2. **Memorandum — separate papers.]** The defendants orally bargained with Freeman, claimed by them to be the agent of the plaintiffs, and by the plaintiffs to be a broker, for the purchase from the plaintiffs of pork at a price exceeding \$50. Freeman telegraphed to the plaintiffs: "Mendel

STATUTE OF FRAUDS — *Continued.*

five bellies, eight. Ehrlich offers seven-eighths ten bellies lighter than last." On the same day he made the following entry in his entry book: "Sold account C. H. North & Co., Mendel, 5 bellies, 8." *Held*, not a sufficient memorandum to comply with the statute of frauds. *North v. Mendel* (73 Ga. 400), 879.

2. **What is contract of sale.]** Defendants went to the shop of plaintiff, wagon and carriage-makers, to purchase brewery trucks. Plaintiff having none on hand, ordered them with the defendants' assent from wagon-builders in another city. The trucks were accepted and paid for by plaintiff. Some alterations were made by plaintiff, at defendants' request, and a painter, employed by the defendants, painted their names and business on the sides of the trucks while on the plaintiff's premises. *Held*, a contract for sale of goods within the statute of frauds. *Pawelski v. Hargreaves* (47 N. J. Law, 334), 162.

STATUTE OF LIMITATIONS.

Computing time.] In computing time under the statute of limitations, the day on which the cause of action accrued is excluded. *McCulloch v. Hopper* (47 N. J. Law, 189), 146.

See INSANITY, 743.

STOCK.

1. **Dividends — increase of capital — life-tenant and remainderman.]** A will bequeathed corporate stock in trust to pay the dividends to the testator's daughter for life, "without diminution of principal." The company, having doubled its original capital from its earnings, issued additional stock, after the testator's death, to the amount of this increase, and divided it among the stockholders in proportion to the amount originally held by them. *Held*, that the life-tenant had no right to this new stock. *Gibbons v. Mahon* (4 Mackey, 130), 262.
2. **Rights of life-tenant and remainderman.]** Where a will provides for a trust to pay income to one for life with remainder to another, and the trustee invests in bonds at a premium, payable at a certain day, he may deduct from the interest received on each bond enough to make good, by successive deductions, the amount of such premium, without regard to the market value of the bonds at the time of deduction. *New England Trust Co. v. Eaton* (140 Mass. 532), 493.

SUBSCRIPTION.

See FRAUD, 60; RAILROADS, 97.

SURETY.

Recognizance executed in blank.] A surety signed a criminal recognizance having the name of the obligee and the penalty blank, but knowing who and what the same were to be, and orally authorized the sheriff to fill the same in, and departed. The sheriff filled the blanks accordingly. *Held*, that the surety was bound. *Brown v. Colquitt* (73 Ga. 59), 837.

See EXECUTOR AND ADMINISTRATOR.

TAXATION.

Of railway cars of non-residents.] Sleeping cars, hired and run by a railway company in Colorado, from a company in Illinois having no office or place of business in Colorado, are taxable in the latter State. *Carlisle v. Pullman Palace Car Company* (8 Colo. 320), 553.

TELEGRAPH.

1. **Cipher despatch — duty to deliver.]** A telegraph company is liable in damages for unreasonable delay in the delivery of a cipher despatch, and the recovery is not limited to nominal damages. *Western Union Telegraph Company v. Putman* (73 Ga. 285), 877.
2. **Limiting liability — negligence — damages.]** The following telegram was written upon a blank stipulating that the company should not be liable for mistakes or delays in the transmission or delivery of any unrepeated message, by negligence of its servants or otherwise, beyond the amount received for sending the same: "Send bay horse to-day. Mock loads to-night." The message was not repeated, and was delayed in transmission by the defendant's negligence, and the sender lost the sale of the horse in consequence. Mock was a well-known horse dealer, in the habit of shipping horses at that place. *Held* (1) that the stipulation did not prevent a recovery for a want of ordinary care and diligence; (2) actual damages were recoverable. *Thompson v. Western Union Telegraph Company* (64 Wis. 531), 644.
3. **Poles in street — nuisance.]** Telegraph poles and wires in a public street are not necessarily a nuisance which will be prohibited at the suit of one in front of whose lot they are erected. *McCormick v. District of Columbia* (4 Mackey, 396), 284.
4. **Requirement of deposit.]** The rule of a telegraph company that a transient person sending a message requiring an answer must deposit enough money to pay for ten words is reasonable, and unless complied with the company may refuse to send the message. *Western Union Tel. Co. v. McGuire* (104 Ind. 130), 296.

TENANTS.

See STOCK, 262, 493.

TRIAL.

Comment of counsel on answer.] The plaintiff's counsel may not comment to the jury upon the discrepancy between the original and the amended answer and argue therefrom that the defense is fictitious. *Taft v. Fiats* (140 Mass. 250), 459.

TRUST.

See EJECTMENT, 870; EXECUTOR AND ADMINISTRATOR, 485; WILL, 213.

VERDICT.

See CRIMINAL LAW, 404.

WARRANTY.

See SALE, 30.

WATER AND WATER-COURSE.

1. **Navigable river — soil below low-water mark.]** The soil in navigable rivers below low water mark, as well as the use of the stream for purposes of navigation, belongs to the public, and the title is vested in the State for the use of the public, and a grant from the State to an individual, under the general land laws, which purports to include the bed of such a navigable stream, and to give the grantee the exclusive privilege of taking sand, gravel, and other deposits from the bed of the stream, is to this extent void. *Goodwin v. Thompson* (15 Lea, 209), 410.
2. **What is "navigable" stream.]** A stream is not navigable upon which logs can be floated only during a freshet or at high water. *Lewis v. Coffee County* (77 Ala. 190), 55.
3. **Alluvion.]** *Linthicum v. Coan* (64 Md. 439), 775.

WILL.

1. **In language not understood by testator.]** A will may be valid although written in a language not understood by the testator. *Will of Walter* (64 Wis. 487), 640.
2. **Legacy in lieu of dower — preference.]** A pecuniary legacy to the testator's widow, accepted by her, must be paid not only in preference to general legacies, but if the abatement of those proves insufficient, in preference, first, to specific bequests, and second, to specific devises. *Borden v. Jenks* (140 Mass. 562), 507.
3. **Per stirpes or per capita.]** A testator directed that the remainder of his estate should be divided equally among his heirs. *Held*, that they took *per stirpes*. *Kelley v. Vigas* (112 Ill. 242), 235.
4. **Trust for charity — certainty.]** Devise was made by a daughter to her mother of all her estate, "upon the express condition however that the devise, by will to be executed before receiving this bequest, so much thereof as shall remain undisposed of or unspent at the time of her decease, to such charitable institution for women in the city of Chicago, as she may select." The mother declined to execute such will. *Held*, that the trust could not be executed until the mother's death. *Mills v. Newberry* (112 Ill. 123), 218.
5. **Vested remainder.]** A will provided: "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of a parent." *Held*, a vested remainder. *Gibbens v. Gibbens* (140 Mass. 102), 458.

WORDS.

- Accident]** See INSURANCE, 398.
Contained in.] See INSURANCE, 631.
Manufacturer.] See STATUTE.
Navigable.] See WATER AND WATER-COURSE, 55.
On the track.] See RAILROADS, 69.
Produce dealer.] See STATUTE, 275.
Use and operation of a railway.] See STATUTE, 11.
Vacation.] See STATUTE, 204.





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